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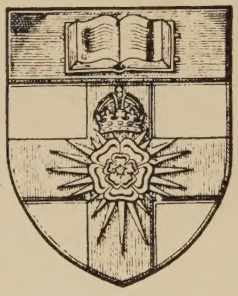

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

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April 26, 27.

GUEST *v.* GASTON AND COMPANY.

Employer and Workman—Injury by Accident—"Out of and in course of employment"—Purposes of Employer's Business—Boarding Tramcar in Motion—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 7.

A workman, authorized to go by tramway from one warehouse to another in the course of his employment, does not necessarily go beyond the limits of his employment in attempting to mount a tramcar in motion. If in so doing he is injured by an accident, the accident may be one arising out of and in the course of his employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906. Whether it is so or not is a question of fact depending, among other considerations, on the pace at which the car is moving, and on the question whether the attempt is merely a negligent way of doing an act within the scope of the employment or is an act so unreasonable as to be outside the scope of the employment.

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Sect. 7 of the Workmen's Compensation Act, 1923, does not operate to bring within s. 1 of the Act of 1906 all acts done by a workman for the purposes of and in connection with his employer's trade or business. Its effect is, in a claim for compensation, where a workman has been killed or seriously and permanently disabled, to preclude the employer from relying on the defences that the workman was at the time when the accident happened acting (*a*) in contravention of any statutory or other regulation applicable to his employment, or (*b*) in contravention of any orders given by or on behalf of his employer, or (*c*) without instructions from his employer.

Whether, if a workman is injured by an accident in the course of doing an act of serious and wilful misconduct such as to take the act outside the scope of his employment, the workman if he is seriously and permanently disabled, or his dependants if he is killed, may recover compensation, *quaere*.

Symon v. *Wemyss Coal Co.* 1912 S. C. 1239 commented on.

APPEAL from an award made by the judge of the county court of Lancashire holden at Liverpool in favour of the employers in a claim for compensation under the Workmen's Compensation Acts, 1906 and 1923.

The applicant, Jane Guest, was the widow of Arthur Thomas Angor Guest. She claimed compensation, alleging that her husband had been killed by an accident arising out of and in the course of his employment.

A. T. A. Guest was a cotton porter in the employ of the respondents, who carried on business in Liverpool. He was an elderly man between fifty and sixty years of age. He was employed, among his other duties, in supervising the weighing of bales of cotton. To do this he had to go to and from the respondents' office and from one warehouse to another; and he was allowed to use the tramways for this purpose and was repaid the fares when he did so. On the day of the accident he had been supervising at a warehouse in Grundy Street. He had to go on to a warehouse in Baltic Road, and when he had finished his work there he was told to return to the respondents' office. After leaving the warehouse in Baltic Road he went into Sandhills Lane, along the south side of which a tram runs in the direction in which he was going. A car, after stopping at a station on that side of the lane, had restarted. When it had got about thirty yards from the station and was going at about six miles

an hour, gathering speed as it went, the deceased man ran to catch it, got hold of the upright handrail and tried to jump on the car; but it was going too fast, and he fell into the road, apparently without having got his foot on the footboard. The injuries he thus received caused his death.

After stating the above facts the award of the county court judge proceeded thus: "The attempt to get on the car in this way was manifestly an extremely risky thing to do, besides being contrary to the well known regulations of the tram service, which forbid passengers from attempting to get on or alight while the car is in motion. The deceased must have known that what he was doing was an act improper, not allowed, and dangerous. It was contended however on behalf of the widow that riding on the car was incidental to or part of his employment, and that by s. 7 of the Workmen's Compensation Act, 1923 (1), the applicant was entitled to recover. Unless that section avails the applicant I think it is clear from the decisions under the Workmen's Compensation Act, 1906, that she is not entitled to recover, and that I must hold that the accident did not arise out of the workman's employment. A number of cases were cited to me, but I do not think it necessary to refer to more than one: *Symon* v. *Wemyss Coal Co.* (2) That case so closely resembles this that I am bound to follow it unless it has been overruled, or the law has been changed by s. 7 of the Act of 1923. *Clark* v. *Southwark Corporation* (3) was based on the effect of the Act of 1906 and of s. 7 of the Act of 1923. I do not think it expressly or impliedly overrules *Symon* v. *Wemyss Coal Co.* (2), and that case is still

(1) Workmen's Compensation Act, 1923, s. 7: "For the purposes of the principal Act,"—i.e., the Act of 1906—"an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

(2) 1912 S. C. 1239.

(3) (1925) 18 B. W. C. C. 367.

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binding on me, and I am bound to hold that the accident did not arise out of the deceased man's employment, unless the law has been altered by s. 7 of the Act of 1923, which is said to have made a difference. . . . . It was contended on behalf of the applicant that riding in the car was an act done for the purpose of and in connection with the employers' trade or business, and that although the act, which caused the accident, was improper, unlawful, or forbidden, if it was for the purposes of or in connection with the employers' business, the accident is within the Act. Can it be said that riding in the tram was part of the man's employment ? It may have been incidental to his employment, but it was not in itself a thing he was employed to do in any real sense. There is no evidence that he was under orders to use the trams ; still less to use any particular tram running at any particular time. There is no evidence that if he had walked when returning to the office he would have been guilty of any breach of duty. Can it be said that trying to get on the tram in this way was an act done for the purposes of or in connection with his employers' trade or business ? He probably ran to avoid the trouble of walking on to the next stopping station, or to avoid the tedium of waiting for a few minutes for the next car. I do not think that an act of this kind can be said to be even incidental to his employment. I do not think the effect of s. 7 is to bring within the area of his employment all added risks which the workman takes upon himself. The object was to get rid of the effect of the decisions that certain prohibited acts were outside the scope of the workman's employment, or perhaps certain voluntary acts done by the workman in furtherance of his ordinary duties without express authority. But the act in this case is not among those contemplated in s. 7. It was not forbidden by the employers, nor contrary to any regulation or instruction of theirs, nor was it an act done for the purpose of their trade or business. To come within the Act of 1906 the accident must have arisen out of the workman's employment or have been in some way incidental to it. According to the decisions before the Act of 1923 this accident did not arise out of the

workman's employment. Sect. 7 of the later Act does not bring it within the employment."

The county court judge therefore made an award in favour of the defendants.

The applicant appealed.

Neilson K.C. and *Goldie* for the appellant. The county court judge was of opinion that *Symon* v. *Wemyss Coal Co.* (1) bound him to hold, as matter of law, that a workman attempting to board a moving tramcar is necessarily acting outside the scope of his employment. But when, as in this case, a workman is authorized to go by tram from one place to another in the course of his employment, it must be a question of fact whether his user of a tram is within the authority or not. If the car was going very fast, the man in attempting to mount it might be adding a new risk to his employment; but if the car was just starting or just stopping, does the mere fact that it is moving conclusively show that the man is acting outside the scope of his authority if he tries to mount it? "If, in the course of his employment, the workman meets with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed": *Upton* v. *Great Central Ry. Co.* (2), per Lord Haldane. It has been held in the Court of Session that a man may be acting within the scope of his employment while getting off a moving vehicle: *M'Lauchlan* v. *Anderson* (3); *Strong* v. *Wright & Co.* (4). In *Clark* v. *Southwark Corporation* (5) a workman, whose duty it was to take part in cleaning a lorry, attempted to climb on to it while it was slowly moving to the garage. It was held by this Court that the accident which happened to him arose out of and in the course of his employment. It follows from these cases that the fact that the vehicle is moving is not conclusive of the question. It is submitted that the true inference to be drawn from the facts is that the workman, though perhaps

(1) 1912 S. C. 1239.
(2) [1924] A. C. 302, 307.
(3) 1911 S. C. 529.
(4) 1922 S. C. 515.
(5) 18 B. W. C. C. 367.

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acting negligently, was still acting within the scope of his employment, and that he met with an accident arising out of and in the course of that employment: *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (1), and that there is no need to consider s. 7 of the Act of 1923.

But if that is not so, at least it was a question for the county court judge whether the man was or was not acting in the scope of his employment, and he should approach this question by considering first how it would be decided under the Act of 1906. If he comes to the conclusion that the accident did not arise out of the man's employment, because the man was acting in disobedience to a statutory regulation, as in *Bourton* v. *Beauchamp* (2) and *Moore & Co.* v. *Donnelly* (3); or to an express prohibition of the employer limiting the sphere of the man's employment: *Moore & Co.* v. *Donnelly* (3); *Borley* v. *Ockenden* (4); then, but only then, it is necessary to consider the effect of s. 7 of the Act of 1923. That section provides that in case of the death or serious and permanent disablement of a workman by an accident, the accident is to be deemed to arise out of the employment, notwithstanding that the man was acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer; but this is conditional upon the act of the workman being done for the purposes of and in connection with his employer's trade or business.

The county court judge has never taken the first step of deciding as matter of fact whether the man was acting in the course of his employment, and therefore at the least the case ought to go back for a finding on this question. Secondly, even if he had decided that the man was acting outside the scope of his employment because he was contravening the regulations of the tramway company, he has wrongly decided that the man was not acting for the purposes of and in connection with his employers' business. There

(1) [1926] A. C. 377.
(2) [1920] A. C. 1001.
(3) [1921] 1 A. C. 329.
(4) [1925] 2 K. B. 325.

is no evidence that he mounted the tramcar because he was too lazy to walk or too impatient to wait for the next car, or from any motive except for purposes connected with his employers' business.

Kennedy K.C. and *Procter* for the respondents. The county court judge was bound to follow *Symon* v. *Wemyss Coal Co.* (1) That case was approved in *Jibb* v. *Chadwick* (2), where a workman, who had to travel by railway in the course of his employment, tried to get into a train in motion, and in *Byrne* v. *Larrinaga Steamship Co.* (3), where the chief steward of a steamship, having gone ashore on the ship's business, attempted on his way back to board a moving tramcar, but slipped and fell and was injured; both decisions of this Court. The question is: "Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment": *Lancashire and Yorkshire Ry. Co.* v. *Highley* (4), per Lord Sumner. Applying this test, was it part of the man's employment to take the risk of mounting a moving tramcar? It certainly was not; the employers could surely not have found fault with him for not taking that risk. It is a mistake to suppose that the county court judge held himself bound by the finding of fact in *Symon* v. *Wemyss Coal Co.* (5) He found that the accident did not arise out of the man's employment because, applying the principle of *Symon* v. *Wemyss Coal Co.* (5), which is in truth Lord Sumner's test in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (4), it was no part of the employment to run the risk of boarding a car in motion. That finding is a finding of fact: *Baker* v. *Earl Bradford* (6), with which this Court will not interfere: *Wardle* v. *Enthoven & Sons.* (7)

(1) 1912 S. C. 1239.
(2) [1915] 2 K. B. 94.
(3) (1918) 88 L. J. (K. B.) 1255; 11 B. W. C. C. 260.
(4) [1917] A. C. 352, 372.
(5) 1912 S. C. 1239.
(6) (1916) 9 B. W. C. C. 436.
(7) (1916) 86 L. J. (K. B.) 309.

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Then if the accident did not arise out of and in the course of the man's employment, as the law stood in 1906, has s. 7 of the Act of 1923 brought it within s. 1 of the earlier Act? It has not, for two reasons: first, because s. 7 does not touch accidents arising out of acts which of their own nature and quality, and apart from regulation excluding them, are outside the workman's employment: *Davies* v. *Gwauncaegurwen Colliery* (1), where the workman met with an accident in a place where he had no business to be; *Borley* v. *Ockenden* (2), where the accident occurred to the workman in his own home; *Kerr* v. *Dunlop* (3), where the workman was doing another man's work; and secondly because, as the county court judge has found, the act out of which the accident arose was not an act done by the workman for the purposes of and in connection with the employers' trade or business, and this was an inference which the learned judge was entitled to draw.

Neilson K.C. in reply cited *Astley* v. *Evans & Co.* (4)

BANKES L.J. There must be a new trial in this case, because the learned county court judge does not appear to have directed his mind to the first and most material question to be decided. Sect. 7 of the Act of 1923 has no doubt added to the difficulties of interpreting the Workmen's Compensation Acts, but a great deal of assistance has been afforded by the recent cases in the House of Lords of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* and *Kerr or M'Aulay* v. *Dunlop & Co.* (3) The decision in these two cases, which were heard together, appears to me to be very useful, first because Lord Dunedin expressed in felicitous language the way in which the section should be approached, and secondly because a distinction was drawn between the two cases which were before the House. In one case it was held that the man was entitled to compensation, because he was merely doing in a negligent way an act which was within the scope of his employment, and in the other case the man failed to get

(1) [1924] 2 K. B. 651.

(2) [1925] 2 K. B. 325; see also *Jones* v. *Tarr* [1926] 1 K. B. 25.

(3) [1926] A. C. 377.

(4) [1911] 1 K. B. 1036; affirmed in H. L. *Richard Evans & Co.* v. *Astley* [1911] A. C. 674.

compensation, because he was doing an act which, from its nature, was outside the scope of his employment altogether, and therefore not within the principal Act, and not being within the principal Act, no question could arise as to whether it came within s. 7 of the Act of 1923. Interpreting that section Lord Dunedin said (1): "The result of this section is, in my opinion, not doubtful. It does not either repeal or amend the radical provision of the principal Act, that the accident to entitle the workman to compensation must arise out of and in the course of his employment." There had been earlier decisions of the Court of Appeal to that effect; but this is a decision of the House of Lords expressed in very clear language by Lord Dunedin and affirming what the Court of Appeal had already said. Then he goes on with regard to s. 7 to say: "but it does introduce a far-reaching, though artificial, consideration, which prevents a certain class of evidence, available to show that the accident did not arise out of the employment, from being any longer in force." It seems to me therefore that in all cases like the present, the first question to decide is whether or not the act which caused the injury did or did not come within the scope of the employment. The decision upon that point must ultimately depend upon the question of fact. In the case to which I have referred in the House of Lords, the one man was held entitled to recover, because, although he was acting negligently in approaching the place of danger before the time allowed by the regulations had elapsed, still the negligence was in the course of doing an act within the scope of his employment. The other man was doing something which did not fall within his duties at all and was exclusively the duty of another class of workman; and in those circumstances it was held that he was taking upon himself an added risk, which took the act out of the scope of his employment.

In the present case the facts are not in dispute; this man was employed to go about to different offices in Liverpool to weigh cotton, and it must be accepted that it was within the scope of his employment to travel from one place to

(1) [1926] A. C. 386.

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another place on a tramcar. On this occasion he endeavoured to get upon a tram which was in motion. Now the question whether a person in these circumstances is negligently doing something which is within the scope of the employment, or incurring an extra risk such as would take the case out of the Act, must be a question of degree, depending upon the particular circumstances of the case. The learned judge here, after setting out the facts, went on to say, on s. 7 of the Act of 1923, "I think it is clear from the decisions under the Workmen's Compensation Act, 1906, that" the applicant "is not entitled to recover, and that I must hold that the accident did not arise out of the workman's employment." Now if this means that the learned judge has found facts which take the case out of the operation of the Acts, his finding of fact would be binding upon us; but he does not say that he is finding facts; he rather indicates the view that he was bound by the decisions as a matter of law; and then he goes on to refer to the *Wemyss Coal* case (1), and says that case so closely resembles the present case that he is bound to follow it. But if that decision depended upon the inference to be drawn from certain facts, and the learned judge did not agree with that inference, he was not bound to follow it. Speaking for myself, there are certain inferences of fact in that case which I am unable to agree with. The facts were very like the facts here. It was the case of a lad getting on a tramcar in motion. The question was, what inference should be drawn from those facts. The Lord Justice Clerk said (2): "The Sheriff-Substitute holds that in 'attempting to get on the car the pursuer was not acting for his own purposes, but on the business of his employer.' I cannot agree with that finding which the Sheriff-Substitute puts in his finding of facts but which is really a finding in law." That amounts to saying that a man getting on a tramcar whilst in motion cannot be acting in the business of his employer or otherwise than for his own purposes. Lord Salvesen says (3): "If it be held to be incidental to the

(1) 1912 S. C. 1239. (2) 1912 S. C. 1243.
(3) 1912 S. C. 1245.

employment of a messenger who is directed to use a public conveyance that he should run the risk of joining it in motion, it appears to be quite immaterial in a case of this kind what is the speed at which the conveyance is moving." With great respect here again I am not able to agree. Assuming that it was within the scope of a messenger's or a workman's duty to use a car in the course of doing his master's business, it cannot be said as matter of law that an attempt to get on a car which is just starting, and just in motion, takes the case out of the Acts altogether, on the ground that such an attempt involves the man in an additional risk, so that he is no longer acting within the scope of his employment. In every case of this class it is a question of degree and a question of fact, in which all the circumstances have to be taken into account, and, with respect to the learned judge, if there is no evidence at all except the fact that the person attempted to board a car whilst it was in motion, I do not think that there is any evidence from which to draw the conclusion that he did that for his own purposes and because either he did not want to wait in the cold at the stopping place until the next tramcar came or he was so lazy that he did not want to walk to the next stopping place. If, as it would appear, the learned judge really directed his mind more to s. 7 than to the principal Act, and did not come to any conclusion on this question of fact before proceeding to consider s. 7, the case must go back to him for a finding upon that particular point. So experienced a judge will, I know, deal with that first point in a way which will make it plain to this Court how he finds the facts, and whether on the facts he finds that this was an act of negligence in doing some act within the scope of the man's employment, or whether it was an act in its nature such as to take the case out of the Act altogether.

SCRUTTON L.J. I sympathize with the county court judges who have the duty put upon them of construing the Act of 1923. I observe the text writers all say with great caution that it will probably need many decisions before the exact

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scope of s. 7. is understood, and I only hope this may be one of the decisions which will help them to understand the exact scope of this section. I understand the section as preventing the employer from raising three specified defences if the act which caused the injury to the workman was done by him for the purposes of and in connection with the employer's trade or business. I do not understand the section as sweeping away all the barriers which prevented a workman from recovering under the Act of 1906, provided that the act was done for the purposes of and in connection with the employer's trade or business. The section seems to me to sweep away three specified barriers and no more ; in particular that which excluded from the scope of the man's employment any act which was prohibited by statute or by direct order from his employer. It is no longer possible, in my view, to take that simple point, and that appears to be in accordance with the view of Lord Dunedin expressed in these words in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (1) : " The only reason for saying that the accident did not arise out of the employment " —he is speaking of the case of *Moore & Co.* v. *Donnelly* (2)— " was the reason which was successfully urged in those cases —namely, that the prohibition in the Act of Parliament made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition." And the learned Lord also says (3) that the argument that s. 7 of the Act of 1923 sweeps away all the requirements of s. 1 of the Act of 1906 is untenable.

Now beginning with the Act of 1906, the accident must arise " out of and in the course of the employment," which has been interpreted to mean, at any rate, something more than " while employed." One marked distinction has been pointed out in a number of cases. If the act which the workman was doing is one he was employed to do and he is

(1) [1926] A. C. 377, 388. (2) [1921] 1 A. C. 329.
(3) [1926] A. C. 385.

negligent in doing it, that does not prevent him from recovering; but he may be doing the act in so negligent a way as to turn it into a different act from that which he was employed to do, and then he is acting outside the scope of his employment. In *Wardle* v. *Enthoven & Sons* (1) I endeavoured to explain that distinction. The distinction is where the workman is doing an act which he is employed to do, but is doing it in such a peculiar and remarkable way as to make it in fact outside the scope of his employment by reason of the way in which he is doing it. This is illustrated in the case of *Russell* v. *Murray* (2), and the principle is expressed by Pickford L.J. in *Pepper* v. *Sayer* (3): "It is possible to imagine cases in which the workman has acted in such an unreasonable way that, even though he were doing something within his employment, the manner of doing it would be so far removed from anything contemplated by either party that it would not be held to be within the employment at all." Now that principle seems to me to be untouched by s. 7 of the Act of 1923, except to the following extent: In many of the cases where it was applied under the Act of 1906 the matter was complicated by the fact that there was a statutory regulation, or by-law, regulation, or express order of the employer, forbidding the man from doing the act in the particular way. If he did the act notwithstanding the direction, he would be acting outside the scope of the employment, either because it was a breach of a statute or by-law or because it was contrary to the express order. The effect of s. 7 of the Act of 1923 is to remove that objection from the consideration of the county court judge, where an accident results in the death or serious and permanent disablement of a workman; it can no longer be held that the accident arose outside the scope of the employment merely because the man was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment or of any orders of his employer. But in other respects an act may

(1) 86 L. J. (K. B.) 309; 10 B. W. C. C. 79.

(2) (1915) 9 B. W. C. C. 81.

(3) (1914) 7 B. W. C. C. 616, 622.

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still be outside the scope of a man's employment if it is more than a merely negligent way of doing an act he is employed to do; if it is an act done in such an unreasonable way as to take it out of the class of acts he was employed to do. I think it is also clear that the distinction between those two classes, which is very difficult to draw and is entirely a question of degree, is, if the principle is correctly applied, a matter of fact for the county court judge. I cannot find that the learned judge addressed his mind to that point. He seems first of all to have taken the view that the man was getting on to the tram in motion for his own purposes; that he did not want to wait at the stopping place or to walk to the next stopping place. I do not find any evidence on which he could reasonably base that finding. In my opinion he ought to have addressed himself to the distinction which I have endeavoured to explain; the evidence was such that it was possible for him to come to either conclusion, and it was a question of fact for him. In these circumstances it appears to me that the case must go back that the learned judge may apply his mind to the facts proved on the lines which I have indicated. I do not propose to say anything about the facts themselves, because matters of fact are for him and not for me.

ATKIN L.J. I agree. It appears to me that the learned judge's judgment was partly based upon his finding in reference to s. 7 of the new Act, that the act done by the workman in boarding this tram was not done for the purposes of and in connection with his employers' trade, or business. It appears to me that in this case there is no evidence to support that view; but that the proper inference from the facts is that this workman did board this tram for the purposes of and in connection with his employers' trade or business. It was part of his employment to travel from one place to another as quickly as he could; a tram was an authorized means of transport, and he was, when he got back, repaid the amount of his tram fare. Therefore there was no evidence to support the finding.

Then there comes the question whether or not, apart from s. 7, the act done by the workman was an act wholly outside his employment. In reference to that I agree with what has been said by my brothers, that the question is one of degree and of fact—namely, whether or not boarding a tram was merely an authorized act done negligently, or an act done in such circumstances as to take the act as done out of the employment. The learned judge seems to be of opinion that the reported cases bound him as a matter of law to come to the conclusion that the person who boards a tram, although he is authorized to do so as part of his employment, must be acting outside the scope of his employment if he boards or leaves the tram when it is in motion. But the conclusion is matter of fact, and conclusions of fact are not binding as authorities. I need only refer to the cases which have been cited to us, but do not seem to have been called to the learned judge's attention—namely, *Strong* v. *Wright & Co.* (1), where a man left a moving vehicle to pick up his coat; *M'Lauchlan* v. *Anderson* (2), where the man left a moving vehicle to pick up his pipe; and *Clark* v. *Southwark Corporation* (3), a recent decision of this Court, of which I was a member, where exactly the same view of the law which I am now expressing was taken by the Court, and it was held that it was a question of fact whether or not a person was outside his employment when he was boarding a lorry moving at the rate of $2\frac{1}{2}$ miles an hour. It cannot be said that a man, authorized to travel on a tram, is necessarily acting outside his employment altogether if he gets on to a tram when in motion, however slow the motion may be. It is a question of degree. Therefore I think the case should go back to the learned judge for him to decide that particular point, and in deciding it he will, of course, direct his attention to two points: one is the question of speed; he must take it that there is no law which prevents a person from being still within his employment if he boards a car when in motion; it is a question of degree. And, no doubt, the learned judge

(1) 1922 S. C. 515. (2) 1911 S. C. 529.
(3) 18 B. W. C. C. 367.

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will also bear in mind the fact that this tram was travelling at the rate of 6 miles an hour, though at an increasing speed, which is not much more than half as quick again as a fast walk, and should be within the capacity of one whom the learned judge described as an elderly man of fifty or upwards.

The other point is, I think, a very important point, and it seems to be lost sight of in this and in other cases. It relates to "serious and wilful misconduct." The difference between the Act of 1897 and the Act of 1906 is that in the Act of 1897 if the accident was attributable to the serious and wilful misconduct of the workman, neither he nor his dependants could recover, but the Act of 1906 expressly makes a difference in that respect. By s. 1, sub-s. 2 (*c*): "If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed." But that seems to imply that, if it does result in death or serious disablement, then, though the injury might be attributable to serious and wilful misconduct of the workman, the compensation is not to be disallowed. I agree that it must be serious and wilful misconduct of the employee, but if it is serious and wilful misconduct of the employee it seems to me that his representatives may recover, though the effect of it was to expose him to a risk which he would not be exposed to in the ordinary course of carrying out his duty. The only case that I remember in which this point has been touched upon is *Symon* v. *Wemyss Coal Co.* (1) There the boy suffered serious and permanent injury. Lord Salvesen deals with it by saying: "No question of serious or wilful misconduct arises in the case, because that cannot be pleaded where an accident to which the Workmen's Compensation Act applies results in the permanent disablement of the workman. The sole question in the case is whether the accident arose out of and

(1) 1912 S. C. 1239, 1245; see also *Bourton* v. *Beauchamp* [1920] A. C. 1008, per Lord Atkinson.

in the course of the respondent's employment." That seems to me, with great respect to a very learned judge, to give the go-by to the difficulty. I think in this case the county court judge will have to meet it and consider whether or not there was "serious and wilful misconduct of the employee" in view of the fact that the man was employed to travel by tram. For the reasons which have been stated this appeal must be allowed and a new trial ordered.

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Appeal allowed.

Solicitors for appellant: *Helder, Roberts & Co., for John A. Behn, Liverpool.*

Solicitors for respondents: *Laces & Co., Liverpool.*

W. H. G.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1926 *May* 10, 12.

C. A. *July* 20.

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Bankruptcy—Execution for more than Twenty Pounds—Payment to avoid Sale—Notice within fourteen Days of Bankruptcy Petition—Receiving Order on another Petition—Notice thereof after the fourteen Days—Claim to Proceeds of Execution by Trustee—"Receiving order . . . . made . . . . thereon or on any other petition of which the sheriff has notice"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 41, *sub-s.* 2.

After taking goods in execution the sheriff received notice within fourteen days thereof of a bankruptcy petition by R. against the debtor, whereupon the sheriff duly retained the proceeds in his hands. Some months later, and before R.'s petition came on for hearing, the debtor filed his own petition in bankruptcy, upon which he was adjudicated bankrupt at once as a matter of course, and the sheriff had notice of this. Subsequently R.'s petition was heard and, as the debtor was already a bankrupt on his own petition, was dismissed. Both the judgment creditor and the trustee in bankruptcy claimed the moneys in the sheriff's hands, and the latter interpleaded:—

Held, by the Divisional Court and the Court of Appeal, that although the sheriff did not receive notice of the petition upon which the adjudication was declared—namely, that of the debtor himself—until after the expiration of the fourteen days after the execution, it was a notice of "any other petition" within the meaning of s. 41, sub-s. 2, of the Bankruptcy Act, 1914, and that the sheriff was bound to pay the moneys in his hands to the trustee.

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Per Lord Hanworth, M.R.: The time within which the notice of another petition must reach the sheriff is the time during which he has the money in his hands and has not parted with it.

Observations of Vaughan Williams J. in *Watkins* v. *Barnard* [1897 2 Q. B. 521, 527 not followed.

APPEAL from Wolverhampton County Court.

The following statement of facts is substantially taken from the judgment of MacKinnon J.

On May 15, 1925, a bankruptcy notice was served on the defendant Juckes at the instance of a creditor named Reeves. On May 21 Mrs. Latter, who had obtained a judgment against Juckes, caused a writ of fi. fa. to be issued to the sheriff. On May 23 Juckes committed an act of bankruptcy by non-compliance with the notice served upon him by Reeves on May 15. On May 27 the sheriff, on Mrs. Latter's writ, seized the goods of Juckes; Juckes paid out that execution, and the sheriff, after deducting his costs, had in hand the sum of 79*l.* 17*s.* On June 5 Reeves filed a petition in bankruptcy against Juckes, and on June 6 notice of that petition was given to the sheriff. As the sheriff had seized the goods on May 27 for a judgment exceeding 20*l.*, it was his duty, under s. 41, sub-s. 2, of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59) (1), to retain that money in his hands for fourteen days. He received notice of Reeves' petition on June 6, which was four days before the expiration of fourteen days from the date of the execution. It was agreed by counsel for Mrs. Latter that on receiving that notice the sheriff was then bound to retain the 79*l.* 17*s.* until he knew the fate of that bankruptcy petition. The next material date was August 6, when Juckes filed his own petition in

(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 41, sub-s. 2: "Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor."

bankruptcy. He having done that, an order of adjudication was at once made upon it as a matter of course. The sheriff had notice of this. On August 28 Mr. Page, in pursuance of that order of adjudication, was appointed trustee of his estate in bankruptcy. On September 10 Reeves' petition, filed on June 5, of which notice had been given to the sheriff on June 6, came on for hearing, and as Juckes had already been adjudicated bankrupt on August 6 on his own petition, Reeves' petition on September 10 was dismissed as a matter of course. Claims for this 79*l.* 17*s.* were then made on the sheriff by Mrs. Latter and by Mr. Page. The sheriff interpleaded, and the issue the county court judge had to decide was whether Mrs. Latter or Mr. Page was entitled to the money. The county court judge decided in favour of Mrs. Latter.

The trustee in bankruptcy, Mr. Page, appealed.

W. N. Stable for the appellant. The county court judge was wrong. The appellant must substantiate his claim either under s. 40, sub-s. 1, of the Bankruptcy Act, 1914 (1), or under s. 41, sub-s. 2, of the same Act. Under s. 40, sub-s. 1, the appellant can only succeed if the respondent had notice of the presentation of a bankruptcy petition, and it is admitted that there was no evidence of such notice. But it was entirely overlooked in the Court below that the onus of showing that she had not received notice was on the respondent: *Ex parte Schulte* (2); *Figg* v. *Moore* (3); Williams' Bankruptcy Practice, 13th ed., p. 324. That onus she has not discharged. There was a notice of the second petition in the Gazette.

(1) Bankruptcy Act, 1914, s. 40, sub-s. 1: "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

(2) (1874) L. R. 9 Ch. 409, 413.

(3) [1894] 2 Q. B. 690, 691.

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With regard to s. 41, sub-s. 2, the point taken by the respondent is that the petition upon which the bankruptcy was declared was not one of which notice was served on the sheriff within fourteen days of the execution. It is clear that a case like the present is within the intention of the sub-section, and it is contended that it is also within its terms. It is admitted that the word "thereon" cannot refer to Reeves' petition. The words "any other petition of which the sheriff has notice" were inserted to protect the sheriff in a case where, having had notice of a petition during the fourteen days which is eventually dismissed, he hands the money over to the claimant. In such a case, if, without his knowledge, another petition had been filed, then, in the absence of the above words, he would be liable for having paid the wrong person. There is nothing in the sub-section to say that the petition upon which the bankruptcy is declared must be one of which the sheriff has had notice within the fourteen days.

Enness for the respondent. With regard to s. 41, sub-s. 2, prima facie the moment the execution was completed the goods became the property of the respondent. The sub-section, therefore, is a statutory modification of the respondent's common law rights, and should be strictly interpreted and not made elastic. "Of which the sheriff has notice" means notice within the fourteen days, and that the notice must have been served on the sheriff. *Bellyse* v. *M'Ginn* (1) shows the importance attached to the giving of notice. If this contention is not upheld, then in the case of bankrupts against whom petitions are continually being filed the sheriff would hold the money indefinitely and the judgment creditor would never get it. But on the contrary view this would not be so, for the sheriff would have to pay over the money as soon as all the petitions of which he had had notice within the fourteen days had been disposed of. The words of Vaughan Williams J. in *Watkins* v. *Barnard* (2) are exactly in point. That case was under s. 11, sub-s. 2, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), which was the

(1) [1891] 2 Q. B. 227. (2) [1897] 2 Q. B. 521.

equivalent of s. 41, sub-s. 2, of the present Act. The sheriff had received notice of a petition, after the expiration of the fourteen days, to administer the estate. Vaughan Williams J., on the assumption that a petition for an administration order was equivalent to a petition in bankruptcy, said (1): "Now, I do not understand it to be said that there was any other petition of which the sheriff had notice within the fourteen days, even if you treat the petition for the administration order as being a petition in bankruptcy. . . . . It seems to me that in the present case [the provisions as to the property available] cannot be held so as to apply because the whole of the fourteen days had elapsed, not only without any receiving order being made on the bankruptcy petition in respect of which the sheriff had notice while he had the proceeds in his hands . . . . but also because upon the agreed facts here he had no notice of any other petition within the fourteen days. . . . ."

Stable in reply. *Watkins* v. *Barnard* (2) is not binding on this Court, and where cited in Williams' Bankruptcy Practice, 13th ed., pp. 294, 428, is not cited in support of this proposition. If the respondent is right it would follow that a bankrupt, by filing his own petition in this way could divert his property from the general body of his creditors.

Cur. adv. vult.

May 12. MACKINNON J. This is an appeal from the county court judge of Wolverhampton in an interpleader issue, the sheriff interpleading. The two claimants were Mrs. Latter, a judgment creditor of one Juckes, and Mr. Page, who was the trustee in the bankruptcy of Juckes. As between Mrs. Latter and Mr. Page, the judge decided in favour of the former. The question is whether he was right in so doing, or whether he ought to have decided in favour of Mr. Page. In my view, that depends entirely upon the effect of s. 41, sub-s. 2, of the Bankruptcy Act, 1914. The facts were as follows. [His Lordship stated them as above set forth.]

(1) [1897] 2 Q. B. 526. (2) [1897] 2 Q. B. 521.

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That sub-section is as follows : [His Lordship read it. (1)] As I have said, within fourteen days notice of a bankruptcy petition was given to the sheriff, and subsequently a receiving order was made against the debtor, but on another petition, and of that other petition the sheriff had notice, because a claim was made upon him by the trustee appointed under that order, and the sheriff therefore clearly had notice at some date of the receiving order having been made upon a petition other than that of which he received notice during the fourteen days. The whole question in this case is whether, as is contended on behalf of Mrs. Latter, the provision in regard to " any other petition of which the sheriff has notice " in s. 41, sub-s. 2, of the Act of 1914, means any other petition of which the sheriff has had notice within the said fourteen days.

The first observation that occurs to me is that the words of the section do not say " on any other petition of which the sheriff has had notice within the said fourteen days." They merely say " or on any other petition of which the sheriff has notice." Having regard to what is obviously the whole purpose of the section, it seems to me that it is a needless addition of words that are not in the least required if you read the sub-section in the enlarged form " any other petition of which the sheriff has had notice within the said fourteen days." The facts show that so to read the words would be to defeat the obvious purposes of the Act by the merest technicality. Reeves' petition, of which the sheriff had notice on June 6, would assuredly have resulted in the making of a receiving order but for the accidental circumstance that on August 6 Juckes filed his own petition, with the result that, as a matter of course, a receiving order was at once made upon it. If the result of that was to prevent the trustee getting the fund in the hands of the sheriff, in my view it would, by reason of an extreme technicality, be defeating what seems to me to be the obvious purpose of the sub-section. On what seem to me clear words and obvious meaning, I had no doubt as to the proper result in the present proceedings, until a certain stage in the argument. But I did

(1) See note (1) ante, p. 18.

come to entertain grave doubts whether that first impression of mine, unassisted by authority, could be right, because our attention was drawn to the case of *Watkins* v. *Barnard* (1) decided by Vaughan Williams J. (as he then was). No doubt the point in issue there was different; but I think that counsel for Mrs. Latter was justified in saying that the learned judge did consider this very point and express his opinion upon it. I need hardly say that any decision or even expression of opinion of Vaughan Williams J., particularly upon a question in relation to the law of bankruptcy, is entitled to and would certainly receive from me the profoundest respect. Personally, from memories of my early efforts in the Court of Appeal, my attitude towards the learned judge is very much that of a man at any time of his life towards his old schoolmaster, quite apart from the respect which is due to so experienced a judge. He says (2): "Upon the agreed facts here he had no notice of any other petition within the fourteen days," which indicates that he thought that the words "of which the sheriff has notice" in regard to another petition ought to have read into them the words "within the fourteen days."

Though there is that clear expression of opinion, I am not sure that it was not really obiter dictum, because there did arise in that case the quite different point whether notice of a petition for an administration order amounted to the same thing or had the same effect as a notice of a bankruptcy petition within the meaning of this sub-section. But I do not wish to base my judgment on that distinction. We are not bound by that decision. Even if it were exactly in point I conceive it to be my duty, if I do not agree with it, to give expression to the opinion to which, having paid the greatest attention to what was said in that case, I have myself arrived. It was because of the existence of that case and our desire to consider the matter in the light of it and with greater care, that we reserved judgment.

In my judgment it is not right to say that the words "within the said fourteen days" should be added after the

(1) [1897] 2 Q. B. 521. (2) [1897] 2 Q. B. 521, 527.

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words " any other petition of which the sheriff has notice " in s. 41, sub-s. 2, of the Act of 1914. That being my own view, from which, after considering the matter I find myself unable to depart, I think that the decision of the county court judge was wrong, and that the appeal should be allowed.

FINLAY J. I agree, and but for the decision in *Watkins* v. *Barnard* (1) I should agree without hesitation. The matter is, I think, purely one of construction, and in a matter of construction it is not, perhaps, very useful to discuss merits, but I do entirely agree with my brother MacKinnon that on the facts of this case the respondent must rely upon what is, after all, the purest technicality. I suppose that there can be no doubt at all that if it had not been for the intervention of the debtor's own petition, upon which, as a matter of common form, an adjudication was at once made, an order of adjudication would have been made upon the petition of Reeves, and if it had been made, of course this argument could never have been raised. It would be an unfortunate result if so purely technical a matter as the intervention of the debtor's own petition operated to effect a substantive change in the rights of other parties.

It is, as I said, purely a question of construction, and I desire, following my brother MacKinnon, to base my decision upon what I conceive to be the construction of the section. The only words which are in question are these : " and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice." There is no doubt at all that there was a bankruptcy petition, and that the sheriff had notice of it within the fourteen days. There is, of course, equally little doubt that the receiving order was not made against the debtor on that petition, for the very good reason that he had already been adjudicated bankrupt on his own petition. The question is whether the receiving order was made on another petition of which the sheriff had notice. That the sheriff had notice of the other petition admits of no doubt, but it is said, and truly said, that he

(1) [1897] 2 Q. B. 521.

did not have that notice within the fourteen days. All I can say is that I think it is impossible to get, out of the words used, what is required in order to support the argument for the respondent. I see no reason, from the earlier words of the section about fourteen days, to import into this part of the section words which are not there, to the effect that the notice of the other petition must have been notice within the fourteen days. The words are not there, and I find it impossible to introduce them as a matter of construction.

With regard to *Watkins* v. *Barnard* (1) I will only say this, that while another matter was discussed, and discussed at greater length than this, Vaughan Williams J. did ultimately base his decision in great part at least upon this point. That being so, I have, like my brother MacKinnon, considered the matter with great anxiety, but I am unable to change the view which I had formed. In these circumstances I conceive that it is our duty very reluctantly to say that we cannot follow that decision, or that expression of opinion, if it be an expression of opinion. If we form a clear opinion we are bound to express it and to act upon it. I entirely agree with all that my brother MacKinnon has said.

Appeal allowed.

W. L. L. B.

The execution creditor appealed. The appeal was heard on July 20, 1926.

Enness for the appellant. Sect. 41 of the Act is a complete conception of a course of conduct on the part of the sheriff. The section is made up of two parts, which when read together constitute an effective section. The only thing that the sheriff must have regard to under sub-s. 1 is a receiving order. While he is in the position described by that sub-section he will no doubt receive notice of a number of petitions, but is not required to do anything. In sub-s. 2, it is submitted, the words "fourteen days" govern the whole of the sub-section.

(1) [1897] 2 Q. B. 521.

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[WARRINGTON L.J. Sub-ss. 1 and 2 refer to quite different matters.]

The two sub-sections were intended to be used together. The sheriff must retain the money in his hands until the specific petition of which he has had notice within the fourteen days has been disposed of. If the sub-section is to be held to refer to any petition of which he receives notice then the money in his hands in the case of a chronic insolvent might have to be retained by him for years while a whole chain of petitions was presented.

[WARRINGTON L.J. The provision as to notice was intended to protect the sheriff. If he receives no notice he may pay it over.]

The words "has notice" in sub-s. 2 do not mean subsequently receives notice. They should be confined to notice within the fourteen days. The sub-section ought not to be strengthened so as to operate harshly on the judgment creditor.

Sects. 40 and 41 constitute inroads on the common law rights of judgment creditors, and their operation ought not to be enlarged so as to defeat those rights. In sub-s. 2 of s. 41 the words "has notice" should be read in their present tense and not as including petitions of which the sheriff subsequently receives notice: *Watkins* v. *Barnard*. (1)

[LORD HANWORTH M.R. referred to *Slater* v. *Pinder*. (2)]

Stable for the respondent.

[LORD HANWORTH M.R. Is there no time limit at all?]

On the day that the petition is dismissed, there being then no notice of any other petition, the stop on the money in the hands of the sheriff comes to an end.

It is submitted that the natural grammatical construction of the sub-section is the right construction to adopt.

[He was stopped.]

LORD HANWORTH M.R. This is an appeal from the Divisional Court which reversed the decision of the judge of the county court at Wolverhampton. The question is whether

(1) [1897] 2 Q. B. 521. (2) (1871) L. R. 6 Ex. 228.

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the execution creditor is entitled to a certain sum of money in the hands of the sheriff or whether that sum ought to form part of the estate of the bankrupt. The facts with the dates are given succinctly in the judgment of MacKinnon J. The question arises under s. 41 of the Bankruptcy Act, 1914. Juckes was in financial difficulties, and on May 1, 1925, a bankruptcy notice was issued by one Reeves against him, which was served on him on May 15. By failing to comply with that notice by May 23 Juckes committed an act of bankruptcy. Mrs. Latter, who had obtained a judgment against him, caused a writ of fieri facias to be issued on May 21. The sheriff seized the goods of Juckes under the writ on May 27, that was four days after the act of bankruptcy by Juckes was completed. The sum for which the sheriff went into possession was larger than 20*l.* He was paid out, and after his costs had been deducted from the sum there remained in his hands a sum of 79*l.* 17*s.* On June 5 Reeves filed a petition in bankruptcy against Juckes, notice of which was given to the sheriff on the following day. From May 27 the sheriff held the money in his hands for fourteen days in order to comply with the requirements of s. 41, sub-s. 2, of the Bankruptcy Act, 1914, and within those fourteen days—namely, on June 6—the sheriff received notice of Reeves' petition. No steps, however, were taken on that petition, because Juckes was given an adjournment of it in order to afford him an opportunity of satisfying his creditors. No receiving order was in fact made until August 6, when Juckes obtained an order on his own petition. On August 29 a trustee was appointed in the bankruptcy. The question is whether Mrs. Latter, who had been diligent in asserting her rights and had put in the sheriff, is entitled to the money in the hands of the sheriff or whether it falls into the estate of the bankrupt to be divided among his creditors.

The matter has to be determined by giving close attention to the words of sub-s. 2, s. 41, of the Act of 1914, which are as follows: [His Lordship read the sub-section and continued:] On the facts stated and the amount involved it is clear that the duty fell on the sheriff when he took possession

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on May 27 to hold the money he received for fourteen days, then, under sub-s. 2, "if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor," as in fact a notice was in this case served on the sheriff on June 6, "and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee who shall be entitled to retain it as against the execution creditor."

What is said is this: It is true that a notice was served on the sheriff of a bankruptcy petition against the debtor on June 6, but a receiving order was never made against the debtor thereon, as the petition was adjourned in order to enable him to make some arrangement with his creditors, and on August 6 the execution debtor filed his own petition in bankruptcy, and therefore the sub-section was not complied with, and consequently there was no obligation upon the sheriff to pay the money to the trustee, and that he ought to pay it over to Mrs. Latter.

The county court judge and also the Divisional Court felt pressed by the view expressed by Vaughan Williams J. in *Watkins* v. *Barnard* (1), that the sheriff should have notice of the other petition, the petition on which the receiving order is made, within the fourteen days. But the judges of the Divisional Court have not followed that view, and it seems to me that the decision of the Divisional Court was right.

It is said by Mr. Enness that under the sub-section the petition of which the sheriff has notice must be a petition of which he has notice within the fourteen days during which he is required to hold the money in his hands. I am unable so to read the sub-section. The words are "if within that time," that is the fourteen days, "notice is served on him of a bankruptcy petition having been presented against the debtor, and a receiving order is made against the debtor thereon or on any petition of which the sheriff has notice."

(1) [1897] 2 Q. B. 521.

Now Mr. Enness agrees that it is not necessary that the receiving order should be made within the fourteen days, but he contends that according to his reading of the sub-section the notice to the sheriff must be served on him during the currency of the fourteen days and not later. Such a construction would, in my opinion, militate against the true principles of the bankruptcy laws, which are directed to securing the distribution of the assets of the bankrupt among his creditors equally, and it is for this reason the title of the trustee relates back to three months before the presentation of the petition. To read this sub-section, which was intended to give an advantage to the creditors generally in such a way as to give the execution creditor an advantage by reason of the mere technicality that owing to the debtor having filed his own petition on which a receiving order followed at once as a matter of course, no receiving order was made on Reeves' petition, of which the sheriff had notice, would be to read it against the spirit of the bankruptcy laws and its real purpose.

In my opinion the fourteen days' limit is the limit within which the notice of a bankruptcy petition must be served, but once served, then it seems to me that the sheriff may have to hold the money in his hands for an uncertain time until a trustee is appointed, which may not be for weeks or even months. The sheriff must hold the money, and even although, as in this case, the notice of the debtor's own petition did not reach him within the fourteen days he had notice of it whilst so holding the money, and in my judgment the words of the sub-section, " or any other petition of which the sheriff has notice," were clearly intended to cover such a case.

Although it is not necessary to decide the point in this case it appears to me that the time within which the notice of another petition must reach the sheriff is the time during which he has the money in his hands and before he has parted with it to any one. That appears to me to be the right view of the interpretation of the sub-section. This reading, it is true, is contrary to the view expressed by Vaughan Williams J. in *Watkins* v.

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Barnard (1), but from the report of that case it appears that the learned judge had not the advantage of hearing so full an argument on the point as we have heard in this Court, and if and so far as that case cannot be distinguished from the present, I am unable to agree with it.

The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. On May 27, 1925, the sheriff had in his hands a sum of 79*l.* 17*s.*, and his duty then was to retain it for fourteen days from that date. The provisions of sub-s. 2 of s. 41 of the Bankruptcy Act, 1914, thereupon took effect. [His Lordship read the sub-section and continued:] What happened was that within the fourteen days there was served on the sheriff notice of a petition having been presented by Reeves, but a receiving order was not made on that petition, because before it came on to be heard a petition had been presented by the debtor himself on which adjudication resulted. The sheriff did not within the fourteen days have notice of that second petition and the receiving order under it, but he had notice of it before he parted with the money held by him. It has been contended that as the receiving order which was made was one made on a petition of which the sheriff had not had notice within the fourteen days the execution creditor was entitled to the money in the hands of the sheriff. In my opinion that is not the true construction of this sub-section. What it means is that the sheriff must, to be within the sub-section, have notice of a bankruptcy petition within the fourteen days, and that it does not matter whether a receiving order is made on that petition or on another petition before he parts with the money. That is the clear meaning of the sub-section. I agree, therefore, with the decision given by the Divisional Court, and this appeal must be dismissed.

I also agree with what has been said by the Master of the Rolls as to *Watkins* v. *Barnard*. (1) Although the opinion expressed by Vaughan Williams J. was in that case contrary to the construction we have put upon the sub-section,

(1) [1897] 2 Q. B. 521.

that decision is not binding on this Court, and is possibly open to the remark that the learned judge was there probably influenced by the desire not to decide, as he was invited to do, the broad proposition that s. 45 of the Bankruptcy Act, 1883, and s. 11 of the Bankruptcy Act, 1890, which is the corresponding section to the section with which we are now dealing with, could in no case apply to an administration order. He in fact said that he was anxious for that reason to decide the case in the way he did.

SCRUTTON L.J. This case raises a question of the construction to be put on a few words in sub-s. 2 of s. 41 of the Bankruptcy Act, 1914. [His Lordship read the sub-section, directing special attention to the words "and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice."] The sheriff here has levied execution and has been paid out, and the money he has received would, but for this sub-section, belong to the execution creditor, but the Act steps in and requires the sheriff to retain the money in his hands for fourteen days. The words in the sub-section "and, if within that time" cannot refer to notice of a petition and the receiving order. It is impossible to hold that the receiving order has to be made "within that time," that is, the fourteen days. The sub-section goes on, "or any other petition of which the sheriff has notice," and it is said that that refers to any other petition of which he has notice within fourteen days, but I think you must read something in. A receiving order has been made on another petition and the sheriff has notice of that petition, while he still holds the money in his hands, and you must read in after the words "of which the sheriff has notice" the words "during the time he holds the money in his hands and has not paid it away to any one." I think that is the preferable construction. The Court must read the sub-section as indicating that if within fourteen days there is notice of a bankruptcy petition, and at any time thereafter there is a receiving order made thereon or on any other petition, then the trustee can claim the money. The words used in the

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sub-section show that the sheriff must hold until he sees whether a receiving order will be made on the petition, and if he receives notice of another petition he must hold until he sees whether a receiving order will be made on that other petition, and if a receiving order is made on any petition the sub-section comes into operation. One hesitates in the face of the decision in *Watkins* v. *Barnard* (1) so to hold, but a great part of the judgment in that case was taken up with the question whether an administration order was on the same footing as a receiving order, and Vaughan Williams J. escaped from deciding that question by holding as he did, but I respectfully think that decision was wrong.

I agree with the decision of the Divisional Court and think this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellant: *W. H. Speed & Co.*

Solicitors for respondent: *Finnis, Downey, Linnell & Chessher, for S. W. Page & Son, Wolverhampton.*

(1) [1897] 2 Q. B. 521.

W. I. C.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1926 *March* 2, 3. C. A. *July* 5, 6.

THOMAS (INSPECTOR OF TAXES) *v.* RICHARD EVANS AND COMPANY, LIMITED.

JONES (INSPECTOR OF TAXES) *v.* SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCIATION, LIMITED.

Revenue — Income Tax — Deductions — Calls paid by Company to Mutual Insurance Association — Surplus of Calls received by Association.

A colliery company was a member of an Association, a company limited by guarantee, the sole activity of which was the indemnity of its members against compensation in respect of fatal accidents to their workmen. The Association was a purely mutual concern, every person or company indemnified by it being a member who could not transfer his rights apart from the works in respect of which he was protected. Calls were made by the Association and were paid by the members for insurance and nothing more. Out of these calls a general fund was built up to meet claims for indemnity. The Association also created a reserve fund, the interest on which might be applied in diminution of the calls upon members. If a member retired from the Association he was entitled to receive in cash a proportion only of what was called his share of the reserve fund:—

Held (by Rowlatt J. and the Court of Appeal): (1.) That the colliery company, in computing the amount of its profits for income tax purposes, was entitled to deduct the amount of the calls paid by it to the Association; and (2.) that the surplus of the calls received by the Association from its members and of the income of its investments over the amount of the outgoings to meet indemnity claims did not constitute profits liable to income tax.

New York Life Insurance Co. v. *Styles* (1889) 14 App. Cas. 381 applied.

CASES stated by Special Commissioners of Income Tax.

In the first case, Richard Evans & Co., Ld. (hereinafter called "the colliery company"), appealed against an additional assessment to income tax in the sum of 3608*l.* for the year ending April 5, 1919.

The colliery company were allowed, for the purpose of the first assessment made upon them for the year in question, in computing their profits, to deduct the amount of the calls paid by them to the South-West Lancashire Coal

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Owners' Association, Ld. (hereinafter called "the Association"), but it being subsequently considered that the deduction of those calls had been allowed in error, the additional assessment in question was made under the Taxes Management Act, 1880, s. 52.

The Association, which was a purely mutual concern, every person indemnified by it being a member, was originally an unincorporated association of coalowners formed after the passing of the Workmen's Compensation Act, 1897, in order to obtain by collective bargaining better terms from insurance companies for insurances against risks of fatal accidents in mines owned by the members, but was incorporated in 1907 as a company limited by guarantee. There were about twenty members. The principal object of the Association, as stated in the memorandum of association, was to indemnify the members against proceedings, losses, costs, damages, claims and demands in respect of fatal accidents to workmen (within the meaning of the Workmen's Compensation Act, 1906), employed at or in connection with any mines in which any member was interested.

The Association had power to accumulate and set aside funds, and to allocate them to any special purpose, and to invest the same in such manner as might be thought fit.

By clause 4 of the memorandum "Every member of the Association undertakes to contribute to the assets of the Association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the Association contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves such amount as may be required, not exceeding 25*l*."

The following clauses of its articles show the method of working of the Association: Any person who as owner, co-owner, lessee, or otherwise was engaged in establishing or working a mine or works, situate in the United Kingdom, or who in the opinion of the committee was interested

in a mine or works so situate, might become a member subject to the provisions hereinafter contained. To obtain admission as a member, written application specifying the mine or mines in respect of which the applicant desired to be protected, was necessary. The application had to contain an undertaking by the applicant that he would perform and observe all the obligations imposed upon him by the Association's regulations, including, in the event of his ceasing to be a member, obligations in respect of accidents occurring before he ceased to be a member. A member was not entitled to indemnity unless and until he was protected in accordance with the articles. The committee had full discretion as to the acceptance or rejection of any application for membership. If they accepted an application they were to give the applicant written notice thereof, specifying the sums payable, which sums the applicant had to pay forthwith, whereupon his name would be entered in the register of members. Upon breach of, or failure to observe, any regulation by a member his membership might be determined, without prejudice however to any obligations incurred before such determination. In such a case the member had no right to be paid or credited with any part of the reserve fund. A member in default as regards the payment of any money due to the Association was not entitled to indemnity in respect of an accident during the currency of such default. The rights of a member were personal, and he had not, except as specifically provided, any share or interest in the funds of the Association capable of being transferred by assignment, operation of law, or otherwise, but if a member, with the written consent of the Association, transferred his mine as a going concern to another person or company and the transferee applied for membership the Association might assent thereto. So too, if a firm was a member and was reconstituted, and notice thereof was given to the Association, the new might stand in the place of the original firm. Similarly, if a member died, or was found lunatic, or became bankrupt, or suspended payment, his legal personal representative, committee, etc., might be

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allowed to be substituted as member. Whenever an accident occurred notice thereof was to be given to the Association.

A fund was to be established by the Association, composed of the contributions of the members made in manner and proportions hereinafter appearing. On or before June 30 in each year each member was to furnish the committee with a written estimate of his probable disbursements for wages or salaries to the workmen in or in connection with the protected mines of the member during the twelve calendar months ending on June 30 of the following year. The committee then (if in their opinion the financial position of the Association should require it) in each year would make a call on the members as soon as possible after June 30 in each year. Those calls were styled "ordinary calls." In the case of each member the ordinary call was to be calculated on the amount of his written estimate at a percentage rate, determined by the committee before making the call, and was to be uniformly applied in the calculation of the amount of the call to be levied on each member. Each member was required within fourteen days of receiving notice of the amount of his call to pay the same to the Association, and the same when paid was to be dealt with as part of what was called "the General Fund," which was the primary fund for the payment of the liabilities of the Association.

Not later than two weeks after June 30 in each year, each member was to deliver to the committee a correct statement in writing of his actual disbursements for wages or salaries during the twelve calendar months preceding June 30. If the amount appearing on that statement was greater than the amount of the member's estimate of probable disbursements, the member had to pay a supplemental call on the amount of the difference, calculated at the same percentage rate as the original call, but if the amount appearing was smaller than the estimate of probable disbursements, the member was entitled to a return of a sum of money, calculated at the percentage aforesaid on the amount of the difference, or, at his option, to be credited with it in or towards payment of any future calls.

In the case of a member being admitted to membership after June 30 in any year, he was required to pay such sum as the committee decided. The committee in fixing it were to have regard to the length of the unexpired balance of the current year.

The committee might, at any time (subject as thereinafter provided), have recourse to the reserve fund when the general fund was insufficient to defray the Association's liabilities, and they had power, whether recourse was had to the reserve fund or not, to make an extraordinary call for the purpose of meeting liabilities or for the purpose of strengthening the reserve fund. The moneys resulting from an extraordinary call expressly made for the purpose of strengthening the reserve fund were to be paid directly into, and to form part of, that fund.

As soon as possible after June 30 in each year the committee was to transfer to the reserve fund such sum from the general fund as in their opinion fairly represented the excess of general fund receipts over expenditure and liabilities attributable to the twelve calendar months ending June 30. The sums so transferred were to be paid to a separate account with the Association's bankers, and might be invested, the resulting income transferred at the committee's discretion to the general fund or accumulated, the accumulations to form part and to be available for the purposes of the reserve fund.

In the event of recourse being had to the reserve fund, it was to be deemed to belong, at the time when recourse was made or contemplated, to the members in the proportions of their respective contributions thereto. The sum proposed to be withdrawn was to be determined by the committee, and the liability therefor apportioned between the members for the time being on the basis of such sum being about to be raised by extraordinary call. If the quota of any member in the sum proposed to be withdrawn exceeded his share of the reserve fund, he had to pay on demand the difference to the Association, which payment was to be carried direct into the reserve fund, dealt with as part of the sum proposed

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to be withdrawn, and credited to that member; but the foregoing provision as to sums paid by members and credited in account to them did not entitle any member to call for payment of the amount so credited or to set it off against any liability to the Association. The committee might credit the members (in relief of ordinary calls only and not so as to ground a claim to payment in cash) with the whole or any part of the income of the investments representing the reserve fund, and the income so credited was to be carried to the general fund.

A member could by giving a six months' notice in writing retire from the Association. Upon his retirement the committee was to ascertain the amount (if any) due from him to the Association as his proportion of the Association's expenses, disbursements and liabilities, and also the amount (if any) due to him out of the reserve fund, the balance being paid to or by the Association or member.

On the retirement of a member he was entitled to receive out of the reserve fund an amount arrived at as follows: The committee should ascertain the share of the reserve fund which would have been deemed to belong to the retiring member in the event of recourse to the reserve fund being had or contemplated at the date of his retirement. The retiring member was to be entitled to receive out of the reserve fund one-fourth of the share so ascertained. In the event of two or more members retiring on the same date such retirements should be deemed to take effect simultaneously. But in the event of the withdrawal of a member by reason of his tenancy of the protected mines expiring, or without default on his part being determined, or in the event of such mines being permanently discontinued or exhausted, he was to be entitled to receive out of the reserve fund three-fourths or one-half instead of one-fourth of the share of the reserve fund deemed to belong to him, such proportions being determined according as the member so retiring withdrew within five years or ten years from the date of his admission. On the retirement of a member the remainder of the share in the reserve fund deemed to belong to him

was to be credited in account to the remaining members in the proportions of the respective amounts which before such retirement they had contributed or were deemed to have contributed to the reserve fund, the sum so credited in account to each member being deemed to have been contributed by him to the reserve fund.

The management of the Association was entrusted to a committee. If the Association was wound up, claims by creditors, and the costs and expenses of winding up were, as between the reserve fund and the other assets, to be deemed to be primarily payable out of the other assets in priority to the reserve fund. The reserve fund or so much thereof as might remain was to belong to and be distributed among the members proportionately, and so likewise as to the other assets (if any) available for distribution.

The following facts were proved in evidence before the Commissioners :—

(*a*) From the formation of the Association in 1897 until 1907 the Association confined its operations to collective bargaining on behalf of its members with insurance companies for favourable rates of premiums on fatal accident risk policies and to settling the terms of the policies. The policies were issued direct by the insurance companies to the members who paid the premiums direct to the companies. The members carried their own liability for non-fatal accidents.

(*b*) The rate of premium charged by the insurance companies to a member was originally at the rate of 8*s*. 6*d*. per cent. on the aggregate annual wages paid by the member. By 1907 this rate had risen to 11*s*. per cent., which was a better rate than could have been obtained by the members by direct bargaining with the insurance companies.

(*c*) In 1907 it was considered that if mutual insurance were undertaken by the members themselves it might be cheaper and might make for stability of premiums, and with this view the Association was incorporated to undertake the business of mutual insurance amongst its members. Every coalowner insured by the Association was a member of the Association.

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(*d*) At the first meeting of the Association the rate of contributions was considered, and it was decided to make an ordinary call on the members at the rate of 10*s*. per cent. and an extraordinary call at the rate of 4*s*. per cent. (payable quarterly). The amount of the calls had been considered each year and had been fixed at the same rates ever since 1907. The ordinary call was carried to the ordinary call account, which was the general fund referred to in the articles of association, and out of this fund the expenses and liabilities were met.

(*e*) The area in which the mines of the members were situated had been liable at intervals to calamities involving a large number of fatal accidents. In order to safeguard the position of the Association in the event of such a calamity happening in the mine of one of its members, it was considered necessary to form, and there was in fact formed, a reserve fund. The balance of the general fund or ordinary call account being the excess of the general fund receipts over expenditure and liabilities was carried to the reserve fund, and the extraordinary calls were paid directly into this fund. No precise figure was originally fixed for the reserve fund. The matter was considered by a special committee in 1914, which came to the conclusion that a reserve fund of 100,000*l*. would be an adequate provision against the risks involved. Owing, however, to the increase of the amounts payable for compensation consequent upon the increase of wages it was afterwards considered that a reserve fund of 200,000*l*. should be aimed at. On June 30, 1917, the reserve fund stood at 84,465*l*., made up of the proceeds of extraordinary calls and excess of general fund receipts over expenditure and liabilities. On June 30, 1920, the reserve fund stood at 147,513*l*. 10*s*. 8*d*., to which the balance at that date of the general fund, 11,302*l*. 16*s*. 1*d*., was added, making a total of 158,816*l*. 6*s*. 9*d*. At the date of the hearing of the appeal the reserve fund had nearly reached 200,000*l*. It was the committee's intention, if the circumstances remained the same, to abandon the extraordinary call which had not in fact been collected for the two years before the date of the

hearing of the appeal and to consider the question of the reduction of the ordinary call.

(*f*) To safeguard the position of the Association still further in the event of a calamity, it had reinsured a portion of its risk.

(*g*) The Association's outstanding liabilities for any year had been met before transferring sums to the reserve fund.

(*h*) The rate of premium charged by the Association for the year 1919–20 was lower than that charged to other coalowners by insurance companies.

(*i*) One member had, owing to the closing down of the mine, withdrawn from the Association, and had received the prescribed fraction of his proportion of the reserve fund.

(*j*) Credit was not taken in the colliery company's accounts for its interest in the reserve fund of the Association, as it would only be entitled to receive its proportion of the fund in the event of the winding up of the Association, or a fraction of its proportion in the event of its withdrawing from the Association.

(*k*) It was open to the Association to wind up at any time, and in that event each member of the Association would be entitled to receive his share of the reserve fund.

It was contended on behalf of the colliery company :—

(1.) That the sole purpose for which the contributions were paid by them was to insure against fatal accident risks.

(2.) That sums expended by it for insurance were admissible deductions in computing its profits for the purpose of assessment to income tax.

It was contended on behalf of the Crown (inter alia) :—

(1.) That the objects of the Association were not only the insurance of its members against risks, but also (inter alia) the accumulation of funds ;

(2.) That the funds so accumulated had not been expended, and under the memorandum and articles of association of the Association need not necessarily be expended for the purpose of insurance or at all, but were applicable to any special purpose which the members might think fit, and in certain

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circumstances were returnable in whole or in part to the members;

(3.) That so far as the contributions paid by the colliery company to the Association had not been expended by the Association for the purpose of insurance, but had been used for the accumulation of funds, they were not money wholly and exclusively laid out or expended by the colliery company for the purposes of its trade and were not admissible deductions in computing its profits and gains.

The Commissioners held that the payments made to the Association were "for insurance and nothing more," and were in themselves reasonable and proper payments. It was true that a surplus had arisen from them to the Association, but that surplus was not divisible among the insured companies, and the fact that part of it might be recovered upon cessation of membership or even the whole of it upon a dissolution did not seem sufficient ground for applying to the present case certain dicta in *New York Life Insurance Co.* v. *Styles* (1), which dicta appeared to be inconsistent with *Salomon* v. *Salomon & Co.* (2); and they accordingly decided in favour of the colliery company.

In the second case the Association appealed against an additional assessment to income tax of 20,000*l.* for the year ending April 5, 1921, under Sch. D of the Income Tax Act, 1918. This assessment was made in respect of the surplus of the calls received from the members of the Association and of the income of its investments over its outgoings to meet indemnity claims by its members and the cost of reinsurance of a portion of the risks it undertook.

On behalf of the Association it was contended: (*a*) that it was a purely mutual concern, (*b*) that under the decision in *New York Life Insurance Co.* v. *Styles* (1) it was not carrying on any trade from which profits liable to income tax arose, and (*c*) that it was not liable to income tax.

On behalf of the Inspector of Taxes it was contended (inter alia) that the decision in *New York Life Insurance*

(1) 14 App. Cas. 381. (2) [1897] A. C. 22.

Co. v. *Styles* (1) proceeded on its special facts and did not govern the present case; that *Inland Revenue Commissioners* v. *Eccentric Club* (2) was distinguishable, inasmuch as the club was found to provide social amenities and had no commercial activities; that the Association carried on a trade, and the surplus of the calls received by it from members and its other income over amounts paid in settlement of claims, etc., was a profit arising from its trade, and that the assessment was correct in principle.

The Commissioners held that *New York Life Insurance Co.* v. *Styles* (1) directly applied, and also that *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (3), although relating to corporation profits tax, also applied, and they accordingly discharged the assessment.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the appellants.
Latter K.C. and *H. P. Glover* for the respondents.

ROWLATT J. In these two cases the colliery company, the respondents in the first appeal, were protected members of the South-West Lancashire Coal Owners' Association, the respondents in the second appeal. The sole activity of the Association is the indemnity of its members against compensation in respect of fatal accidents to workmen; it is a purely mutual concern, every person or company indemnified by it being a member. The payments made by the colliery company to the Association were for insurance and nothing more, and it is found that they are reasonable and proper and such as would be admissible if paid to an ordinary insurance company.

The object of the Association is to indemnify its members, and to accumulate and set aside funds for that purpose. In the event of its being wound up, every member is liable to contribute 25*l*. Its members are those who are protected by it; there are no shareholders, the Association being limited by guarantee. To obtain admission as a member of the

(1) 14 App. Cas. 381. (2) [1924] 1 K. B. 390.
(3) [1924] W. N. 295; affirmed [1926] A. C. 281.

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Association the person applying must fulfil certain requirements, and, having done so, and paid the premiums, he obtains protection against claims and losses by calls made upon his fellow-members and himself. Every member is in the same position, each providing the Association with funds to indemnify each particular member. The rights of a member cannot be transferred apart from the works in respect of which he is protected, but the articles contain provisions for the case of a transfer of works or on death, bankruptcy and lunacy, so that the benefit of the protection may run on to the successor of the member disappearing, he however continuing liable for claims already accrued. The Association not only collects rateably from members each time a loss occurs, but it builds up a fund by asking members to pay proportionately to the wages paid at their works, provision being made for having this estimated beforehand and adjusted at the end of the year. Out of these "calls," as they are termed, is built up a fund with which to meet the claims for indemnity. In addition, the Association has liberty to create, and has created, a reserve fund, something beyond the ordinary or current fund, with which to meet extraordinary calls, I suppose to equalize liabilities over a long series of years, the interests in this reserve fund being elaborately provided for. At no time does a member, subject to one small qualification, have anything returned to him in cash, but the interest which is accruing on the reserve fund goes in diminution of his calls. The money is kept by the Association for making the protection of all members effective. A member can retire if he chooses, and if he does so he is entitled to get back in cash, not all, but a proportion, of what is called his share in the reserve fund, and this is the only instance of a member receiving cash from the Association. The way in which the interest in the reserve fund is to be calculated as between those shifting bodies of people is provided for by elaborate machinery, the object being to show in what proportion any member is entitled to have his calls reduced, and ultimately, if he retires, the proportion he can take out of the fund.

In the first appeal the question is whether the colliery company in computing its profits and gains can deduct as an expense the sums it pays to the Association. It is not denied that an insurance premium paid to an insurance company to obtain the like protection would be a deductible expense, and certainly if the payments made by the colliery company are to be regarded simply as payments of that kind they are deductible. Why is it suggested that the payment made to the Association is not deductible? One suggestion is that it is not deductible, because some of it may be returned. But it can only be returned if a member retires from membership of the Association. I do not think this circumstance can, even in part, take the payment out of the category of a genuine insurance premium. If a person pays a premium for insurance with a right to a refund next year or in certain events it might perhaps be said that he is paying a premium under discount and the full amount cannot be claimed as a deduction, but that does not arise here. Whether a member will get anything back is extremely remote; the occasion may never arise, and I do not think I need further consider the point. It is said, then, that the colliery company having paid the money to the Association still owns the money in the sense that it is interested pro rata in it as a reserve. I do not think that has any bearing upon the point. The colliery company has paid the money and bought with it, or in respect of having subscribed it, the protection not only of its own payment, but the protection of the combination of all the other people who have done the same. The argument treats this payment by the colliery company as if it were one which it had carried to a contingencies fund, or some domestic insurance fund—an argument which simply means that the colliery company has not really spent the money. That is not so. The money has been laid out, the colliery company buying protection with it upon a true insurance principle—a principle which pools or distributes losses. I think, therefore, that the payments are deductible. The first appeal must be dismissed.

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It is said for the Crown that if the colliery company is entitled to deduct those payments the Association is taxable in respect of them. That seems to me to be a fallacious argument. Assuming that the sums paid by the colliery company in a particular year are more than sufficient to protect it, inasmuch as it has had no accident in that year, then, if there is an insurer in the case, there is in that an element of profit. But one cannot follow the germ of profit in one payment and say that in what follows there must always therefore be a profit. Every taxpayer must be looked at as regards his own business, and the money that may come in may be capital expenditure of the person paying it and income of the person receiving it. This fund cannot be followed through for this purpose. The position of the receiver must be looked at, and in this case the Association might make a loss, or might do so if it were an ordinary insurance company, on the year. The position of the Association must be looked at as a whole, quite irrespective of the position of the protected persons. The question then in the second appeal is: Did the Association make a profit? This brings me to a consideration of *New York Life Insurance Co.* v. *Styles*. (1) The Commissioners say that it is difficult to understand and reconcile that case with *Salomon* v. *Salomon & Co.* (2) I feel no difficulty of that kind. The principle laid down in *Styles'* case (1) is that no one can make a profit out of himself. That is true, but I am not sure that it does not confuse us in this case. It is true to say that a person cannot make a profit out of himself if what is meant is that he may provide himself with something at a less cost than that at which he could buy it, or if he does something for himself instead of employing some one to do it. He saves money in those circumstances, but he does not make a profit. But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if any other trading company, by trading with its shareholders even if it is limited to

(1) 14 App. Cas. 381. (2) [1897] A. C. 22.

trading with them, makes a profit, that profit belongs to the shareholders in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers; it comes back to them as shareholders upon their shares. Where all that a company does is to collect money from a certain number of people—it matters not whether they are called members of the company or participating policy holders—and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand *Styles'* case (1), there is no profit. If the people were to do the thing for themselves there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand, is the effect of the decision in *Styles'* case. (1) Is there any distinction between that case and the present? I can see none. The money subscribed by the colliery company is used for its protection; the fund belongs to it, and a large amount is kept in hand. No doubt, as the money is not distributed year by year, and calls are not limited to actual losses, but to enable a fund to be built up, it may in a sense be said that the Association has a fund which it holds as a company and which it does not divide among all the people who have built it up, inasmuch as members may come in when the fund has been largely built up, and so there is a fund which does not go back to those people who subscribed it individually. That, however, must I think have been so also in *Styles'* case (1), because there was there a reserve fund, which involves that when a life dropped and the assured's representatives were paid the amount due upon the policy with bonus additions there was still something left in the hands of the company beyond what was necessary to pay the claims as they became due. But that fact did

(1) 14 App. Cas. 381.

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not affect the decision. The broad principle was there laid down that, if the interest in the money does not go beyond the people or the class of people who subscribed it, then, just as there is no profit earned by the people subscribing, if they do the thing for themselves, so there is none if they get a company to do it for them. I am fortified in this view by what was said in *In re Padstow Total Loss, &c., Assurance Association* (1) and *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (2), although it may be that what was there said upon this point was not absolutely necessary for the decision. The second appeal must also be dismissed.

Appeals dismissed.

J. S. H.

The appellants in both cases appealed. The appeals were heard together on July 5 and 6, 1926.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the appellants. The questions raised by these appeals are: (1.) Can a member of a mutual insurance company deduct what he pays to the company as being expenses of his business? and (2.) Are those sums paid to the insurance company liable to be treated as profits of the company? Clubs have never been held liable to income tax, because the members put their money into a common fund, and what is left of that fund is held for the members and is not a profit. If that view applies in this case then where a company which has contributed 5*l.* gets 1*l.* back, that 1*l.* is not a profit or a gain and is not subject to tax. But if that is not the true view of the position here, then the insurance company merely holds the sums so paid on behalf of the contributing member, who cannot claim to deduct them when he pays tax. If the sums paid are not outgoings of the business then this case differs altogether from *New York Life Insurance Co.* v. *Styles*. (3) If it is the right view—which however we do not admit—that *Styles'* case (3) decided that the entity of the

(1) (1882) 20 Ch. D. 137.
(2) [1924] W. N. 295; affirmed [1926] A. C. 281.
(3) 14 App. Cas. 381.

company can be ignored where there is mutual dealing, then Richard Evans & Co., Ld., have set aside money for their own business and cannot deduct that money for income tax purposes. But if on the other hand the true view is that the company has paid moneys over to an entity entirely separate from itself without any right to get those moneys back, then the company, which makes those payments, may make deductions in respect of them, provided that there is a genuine receipt given for them by the company which receives them. But if the moneys are returnable in any way then they are not outgoings. If the insurance association was a sort of trustee or agent for the colliery company then the sums paid to it were never paid away by the paying company and were in the same position as a reserve fund and cannot be treated as an outgoing.

Styles' case (1) was discussed and distinguished by Rowlatt J. in *Liverpool Corn Trade Association* v. *Monks* (2), but he followed and applied it in the present case.

Notwithstanding the view taken by Rowlatt J. it is submitted that the facts in *Styles'* case (1) were quite different from those in the first case, and we rely on what was said by the House of Lords as to the effect of the transaction in that case. (3)

One of the cases cited against us was *Adam Steamship Co.* v. *Inland Revenue.* (4)

[LORD HANWORTH M.R. That case will not assist us. The question is were the sums paid for insurance ?]

In the second case we have a case remote from anything in *Styles'* case. (3) Here there was an incorporated company, and no part of the fund belonged to the contributories. It was a deliberate case of accumulation of capital. The purposes for which a fund is established are perfectly immaterial. A clear distinction must be drawn between the company and its members : *Mersey Docks* v. *Lucas* (5) and *Brighton College* v. *Marriott.* (6) Life assurance business has never

(1) 14 App. Cas. 381.
(2) [1926] 2 K. B. 110.
(3) 14 App. Cas. 381, 394, 407, 411.
(4) 1921 S. C. 141.
(5) (1883) 8 App. Cas. 891.
(6) [1926] A. C. 192.

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of recent years been treated for the purpose of ascertaining the profits on the principle of merely taking into consideration the difference between receipts and expenditure. In *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (1) Lord Cave did not suggest that the matter was concluded by *Styles'* case. (2)

[He also referred to *Last* v. *London Assurance Corporation.* (3)]

Latter K.C. and *H. P. Glover* were not called upon to argue.

LORD HANWORTH M.R. These two appeals raise questions which are so closely associated that we have adopted the course of having both cases called on, and Mr. Hills has presented his argument successively and also distributively in both cases, because it was almost impossible to keep the arguments of the one wholly independent from the arguments of the other.

Both cases are appeals from Rowlatt J., who held that the Crown were not entitled to make an assessment in the first case upon Richard Evans & Co., Ld. (hereinafter called "the colliery company"), and in the second case upon the South-West Lancashire Coal Owners' Association (hereinafter called "the Association"). The facts out of which the suggested liability to income tax arises are these: The colliery company carry on a business of colliery proprietors in South-West Lancashire, and they claim to deduct from the profits or gains which are liable to income tax a sum which they have paid in respect to insurance. They desired to be insured against the risks of liabilities to which they might become subject in respect of the men they employed as miners in the course of their business. For that purpose, the colliery company and a number of other companies or colliery proprietors formed themselves into the present Association, and through that Association they obtained the insurance which was suitable to their risks and which gave

(1) [1926] A. C. 281. (2) 14 App. Cas. 381.
(3) (1885) 10 App. Cas. 438.

them the protection which they desired. In the memorandum of association of the Association are contained what are in effect the terms of the policy. By clause 3, (1.): "The Association was formed to indemnify the members of the company against proceedings, losses, costs, damages, claims and demands in respect of any accident, or alleged accident resulting or alleged to have resulted in fatal injury to any workman or workmen (within the meaning of the Workmen's Compensation Act, 1906) employed at or in connection with any mines in which any member of the company is interested and to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, apply, or at or in connection with any railway, factory, quarry, brick-works, engineering works, or other works in which any member of the company is interested, and arising out of and in the course of such employment." It is quite plain, having regard to the number of acts which are referred to in that clause which I have just read, that the risks incident to carrying on what is, in some aspects, a hazardous trade, must subject the employers and owners to the possibility of heavy demands being made upon them in respect of injuries to their workmen, against which it is important that they should be able to insure themselves. There are two kinds of insurance which they particularly desired. One is in respect of the accidents, unfortunate though they are, but fairly constant, and possibly averaging out in the course of the year in which a certain number of men are injured, sometimes by the fall of coal, sometimes on the surface in connection with railway work, and in a number of other ways, ancillary to the mine. But there is another and still more grievous form of accident to which those who are engaged in working coal are subject, not necessarily in any district in any particular year or portion of a year, but, taking the whole period, decade by decade, you will find unhappily that there are very severe accidents, leading sometimes to the destruction of the mine and very considerable loss of life. One has to bear in mind those two classes of liabilities against which it was important that the mineowners

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should insure themselves. The colliery company therefore became members of this Association. The rights of a member were these: He was to be indemnified against the risk that I have described, and he was to make a contribution. He was to pay what was in effect his premium, which was based, as we are told in clause 17 of the Case, on this: "Each member shall deliver to the committee a correct statement in writing of his actual disbursements, by way of such wages or salaries as aforesaid during the twelve calendar months preceding such 30th June." Then: "If the amount appearing on such statement is greater than the amount of the member's previously delivered estimate of probable disbursements, such member shall forthwith pay a further or supplemental call on the amount of the difference, calculated at the same percentage rate as the original call, but if the amount appearing on such settled statement is smaller than the amount of the member's previously delivered estimate of probable disbursement, such member shall be entitled to a return of a sum of money, calculated at the percentage aforesaid on the amount of the difference, or, at his option, to be credited with such sum of money in or towards payment of any future calls." In other words, each member of the Association makes his contribution, which is in effect his premium, according to the estimate of the wages and actual disbursements in a particular twelvemonth, and adjustments are made to show that his premium in effect accords with the actual disbursements and wages paid.

In addition to that sum so paid, it was decided, and rightly decided, by the Association, to establish a reserve fund. The Association had power by resolution to make an extraordinary call for the purpose of meeting liabilities, but it gradually, as I understand, built up this reserve fund mainly by not paying back to the members some aliquot part of the sums paid by them which was in excess of the sum needed to meet the ordinary risks of the insured, and by attributing those excesses to the reserve fund. By this means it has accumulated a considerable sum in its hands ready to meet, if it should unfortunately occur, some

cataclysm such as I have indicated, which is the second branch of the liability against which the insured desire to be insured. That that second branch was a very important one is shown by this, that the reserve fund has been progressively accumulated, and, more than that, lest it should in itself, although it had reached approximately 200,000*l.*, be insufficient to bear the burden of a heavy call upon it, the Association has reinsured a portion of its risk of that nature with an insurance company, thus providing on the second head of insurance an indemnity to its insured to meet an extraordinary liability.

With regard to the possibility of any of this sum so built up in the reserve fund coming back to insured members, the matter stands in this way: There is not in the ordinary course, as in what I may call a dividing club, a distribution of the assets not called upon to meet liabilities at the end of a year, or quinquennial or decennial periods. No member is entitled to withdraw from the Association, except on terms that, after giving notice it has been ascertained that all accidents falling within the period during which he was a member have been met. Then if he ceases business altogether he may be entitled to withdraw on certain specified terms, which are shown in clause 22 in the Case. If he withdraws within five years from the date of his admission, he is to be entitled to three-fourths instead of one-fourth of the share of the reserve fund deemed to belong to him, and that increases if he retires after a longer period. Now all that indicates that in some possible, though remote, event there may arise a right to an insured member to receive back some portion of the sum which he has helped to accumulate, but while the insurance system is in operation he makes his contribution to a fund, and his colleagues in the Association equally with himself have a right to share or to receive a portion of the sum which they have put together, if either of them respectively should meet with accidents which are within the indemnity clause. I have sketched, perhaps imperfectly, the system of insurance which is adopted by members of this Association. They pay

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their moneys on this quota arranged on the basis of wages. They are liable to pay in response to an extraordinary call, but it has been found possible to build up the reserve fund out of ordinary contributions. There have been extraordinary calls, and the reserve fund has been built up partly out of them, but they were made some years ago and have not been resorted to recently.

The reason why the members of the Association, including the colliery company, are members of the Association is that they may be insured persons reaping the advantage of a system of insurance, and they pay over their moneys, which have all the characteristics of premiums, in order that they may obtain insurance and nothing more. There are no other objects of the Association. The Association is not formed to advance any particular scientific methods, or propaganda, or anything of that sort. It is formed for the purpose of insurance and nothing else. When one has come to see that that is so, these sums which are paid for insurance are, like other costs of insurance, deductible from the profits and gains which are the subject of income tax.

The Commissioners gave their decision in the following terms: "There is no doubt in this case that the payments made . . . . are 'for insurance and nothing more' and that they are in themselves reasonable and proper payments. If they were made to an ordinary trading company they would be clearly admissible in whole," and they held that the payments in the case being for insurance, and therefore part of the cost of seeking the profits and gains which are the subject of income tax, are deductible.

What is said on behalf of the Crown is, that inasmuch as at some time there may conceivably be an end put to the Association, as one member after another may retire in accordance with the articles of association, if and when those events happen there may be a chance of some payments being made by way of return to them, and therefore that the payments made to the Association are not in themselves for insurance and nothing more; that they have in part the character of accumulating sums, held in reserve for,

but ultimately distributable among, the members of the Association. It appears to me, from what the Commissioners have found, and after consideration of the cases, that the character of these payments is not altered, and that they remain premiums, although there may be this possibility, more or less remote, of an ultimate return of some of the money. Rowlatt J. says: "The colliery company has paid the money and bought with it, or in respect of having subscribed it, the protection not only of its own payment but the protection of the combination of all the other people who have done the same." With regard to this accumulated reserve fund, the liability in respect of the protection that the insurer requires is not one which can be estimated or determined at the end of a year, or two years, or five years. So long as the member is conducting his colliery he wants to have the protection as and when any serious accident may occur, and the sum that has been accumulated is not more than sufficient to meet that possible liability. That the sum accumulated is not more than sufficient to meet that liability is abundantly proved by the fact that the Association has actually taken out a policy with an insurance company to reinsure that risk, and it appears to me that, from the evidence in the case, this accumulated fund is such as may be needed and, according to the judgment of business men, is needed to meet such a loss as the member desires to be insured against. If the business men carrying on the Association thought it safe to say that the accumulated reserve was too large, and that the Association might be able to distribute, or allow a set-off against the premiums, if that contingency were to arise then it would be possible for the Revenue to say: "Well, you have not paid the whole of these premiums." They could point, if and when a distribution was actually made, to the quota received, and say that the sums paid for premiums must be diminished, because in fact the members of the Association had not paid their full premium. But upon the facts before us it is plain that these sums are paid for the purpose of obtaining insurance and for nothing more, and that there is no reason to cut down

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the cost of this insurance below the sum which has actually been paid by the members of the Association, that is, in this particular case, the colliery company. For these reasons, in the first case it appears to me clear that these sums so paid by the colliery company are properly deductible as part of the costs of seeking the profits and gains which are the subject-matter of and chargeable to income tax.

The second case is a different one. Here we have to deal with an additional assessment to income tax made upon the Association. It is said on behalf of the Revenue that the Association, whose purposes I have already described in the first case, has received the moneys of its members for the purpose of insuring them against the ordinary risks and of accumulating a fund to meet the extraordinary risks to which its members are liable, and further that, inasmuch as those payments have been made and parted with to the Association, the Association has now got them in its hands and bought them in the sense that the Association is trading and has received these sums or premiums paid by their members in the course of its trade.

We are reminded (if we need to be reminded) that it has been decided quite recently in this Court, and confirmed by the House of Lords, that a mutual insurance company carries on a business. In *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (1) it was held that a company incorporated under the Companies Acts as a company limited by guarantee and having no share capital carried on a mutual fire insurance business. There the number of members was unlimited, but it was held that the company carried on a trade or business. So here it is said that this Association is carrying on the business of insurance. It receives money from its members; it insures them against losses and risks; it pays money out to them as an indemnity against the risks and losses if and when they are incurred, and it is therefore carrying on business. And more than that, it does accumulate a certain sum as a reserve fund, showing that it has received into its hands more than is necessary for

(1) [1924] W. N. 295; affirmed [1926] A. C. 281.

meeting annually the demands made upon it by its members in respect of the losses they have incurred. The Revenue say that in respect of that margin, that excess beyond what is necessary to pay the members, the Association is liable to income tax for having made a gain in the course of carrying on what is undoubtedly its business. But when we consider what the Inland Revenue are claiming, they must show that there are profits or gains in the course of carrying on the business. In my judgment in the *Cornish Mutual* case (1) I called attention to the fact that we sent for the book containing the reason which was given as an argument on the appeal in the House of Lords in *Last* v. *London Assurance Corporation* (2), and we found it was this: "Because the surplus of trading does not constitute profits or gains within the meaning of the Income Tax Acts." One has always to consider whether this surplus of trading does or does not constitute profits or gains within the meaning of the Income Tax Acts.

In *New York Life Insurance Co.* v. *Styles* (3) it is pointed out that the company in that case was not liable, because what it was doing was dealing with a number of mutual insurers. The sum that it received was received for and on behalf of the members; it was not for the purpose of making a profit; it was not returnable as a profit to the shareholders of the company, but it was accumulated for the purposes of mutual insurance, and it was there held that no part of the premium income received under the participating policies was liable to be assessed to income tax as profits or gains under Sch. D, because they were not profits or gains under that Schedule. They were sums received, but they were not profits or gains; and so here it appears to me that these sums which have been received and not paid back, which have been accumulated by the Association to meet this larger risk against which the insurers desire to be indemnified, are still moneys not accumulated as profits or gains by the Association, but held in its hands for the purpose of insurance,

(1) Unreported. (2) 10 App. Cas. 438.
(3) 14 App. Cas. 381.

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and not returnable as a profit or gain by any person or to any shareholder.

The case is not like *Last* v. *London Assurance Corporation.* (1) There there were actual profits and gains made and returnable, not merely to its policy holders, but also to its shareholders. That point does not arise in this case. We have here to consider what is the nature of this excess held by the Association beyond the actual sums paid out. In my opinion it falls within the description of the accumulations in the *Styles'* case (2), and is not a profit or gain within the meaning of the Income Tax Acts.

It is said that once the first case is decided in the way it has been, that these moneys were absolutely paid over by the insured to the Association for the purpose of obtaining insurance, then the moneys that have been so paid over become the property of the Association, and that the Association ought then in its turn to be liable to income tax in respect of the excess that they have received. It appears to me that there is no inconsistency in saying that both judgments of Rowlatt J. are right. True, in the first case the sum is deducted because it represents the cost of obtaining the insurance by the assured, but it does not necessarily follow that the money received by the Association is as to a part of it the reaping of a reward or gain by the Association. It must still be looked at from the point of view of mutual insurance. Regarded as such, the Association does not make a profit or gain which is of the nature or character which subjects it to income tax.

For these reasons I think the judgment of Rowlatt J. in both cases was right, and both appeals must be dismissed with costs.

SCRUTTON L.J. These two appeals raise from different sides the question as to the assessability to income tax of a transaction with a mutual insurance company. In the first case, which deals with the assured, the question is whether the colliery company can deduct the amounts it has paid

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

to the mutual insurance company as costs of carrying on its trade.

In the second case, which deals with the insurance company itself, the question is whether a surplus of premiums over sums paid out in compensation is a profit of the company which can be taxed to income tax.

Rowlatt J. has decided that the assured can deduct the sum it has paid to the company and that the company is not liable to pay on the excess of premiums over sums paid out in compensation. I agree that he was right in both cases, and I only shortly express my reasons for that decision, because I rather gather that the strenuous argument that we have listened to here may be repeated to a higher tribunal.

The authorities are a little interesting in their historical progress. In *Last* v. *London Assurance Corporation* (1) an insurance company issued policies to persons who were not its shareholders, with a provision that if it made a profit it would pay back to the policy holders a proportion of that profit, described as a bonus, and the question was then raised: "Can the insurance company say that the part of its profits that it pays back to the policy holders under the terms of the contract is not taxable as a profit to income tax?" and when all the Courts had finished dealing with it four judges thought one way and four the other; but fortunately for the Crown, in the highest tribunal there were two judges who thought one way and one the other. Every Court was divided, and so, by two to one in the House of Lords, reversing the Court of Appeal, which had been two to one the other way, it was held that the amount returned by that insurance company to the assured, the policy holder was assessable to income tax. That case is worthy of note, because I think it explains what happened in *Styles'* case. (2) In *Last's* case (3) a question had also been raised in the Court of first instance whether that portion of the profits which was not paid back to the policy holder, but was put into a reserve fund, was assessable to income tax, and that question

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.
(3) (1884) 12 Q. B. D. 389.

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did not get beyond the first Court, for both judges agreed in the conclusion that was arrived at. Day J. said (1): "The third question is as to the right of the Crown to levy the duty upon what has been termed the life fund. This should, in my opinion, be answered in the negative. The case of the *Imperial Fire Insurance Co.* v. *Wilson* (2), to which our attention has been directed, has, in my opinion, no bearing upon the subject. In the course of the argument I have pointed out the radical distinction and difference between fire and life assurance, and I will not repeat myself further than to observe generally that, as fire insurances run out in all their incidents in one year, each payment of premium representing a thoroughly fresh transaction, it practically matters not to either side for income tax purposes whether the profit, which is in such case simply the excess of annual premiums received over annual losses actually sustained, is ascertained with minute accuracy by reference to the current year of each policy, or whether one takes the arbitrary year of the calendar and assumes that to be the true policy year in respect of all receipts and payments within it; the average must be substantially the same in either. In life insurance each year's premium has relation to the whole duration of the life or risk, and every year's premium has to be set aside and capitalized for payment of the future debt: in no sense whatever can the life fund as such be deemed to represent profit."

That being the decision in *Last's* case (3), in *Styles'* case (4) an insurance company, which had no policy holders who were not members, questioned whether their case was covered by the decision in *Last's* case. (3) The Crown said it was. The assurance company said that inasmuch as all its policy holders were members there was a difference between that case and *Last's* case (3), and the case went to the House of Lords. Fortunately there were six judges in the House of Lords this time, instead of three, and four of them, including Lord Bramwell, who had been the dissentient judge in *Last's*

(1) (1884) 12 Q. B. D. 400.
(2) (1876) 35 L. T. 271.
(3) 10 App. Cas. 438.
(4) 14 App. Cas. 381.

case (1), took the view that the fact that the policy holders were members made all the difference, and that a mutual insurance company was not covered by the decision in *Last's* case (1), because the sums paid back were paid to members of the company, who had themselves contributed the premiums out of which it was supposed that the profit arose.

Now there has been a question what the House of Lords exactly decided in *Styles'* case (2): whether they decided that a mutual insurance company, all of whose policy holders were members, did not trade with its members; and there was a sentence in Lord Watson's judgment which suggested that it did; or whether they decided that the result of its trading with its members was not a profit. The House of Lords in the *Cornish Mutual* case (3) have held that it was not decided in *Styles'* case (2) that a mutual insurance company did not trade with its members, but that what was decided was that the profits which it made and returned to its members were not profits assessable to income tax. But in the facts stated to the House of Lords in *Styles'* case (2) it appeared that again there was a surplus fund. It was pointed out that the company did not return to its members all the surplus, but only so much of it as was thought prudent, having regard to the liability of the company for future expenses and profits, and no question was raised in that case whether the reserve fund was liable to be assessed, for the reason that that question had been settled in *Last's* case (1) without any appeal, and that it was therefore unnecessary to raise the point.

We now come to the present case. Here again is a mutual insurance company, an Association of colliery owners, who insure in the Association, of which they are all members by reason of their insurance, against their liability to pay compensation to their workmen under the Workmen's Compensation Act. They pay premiums, which are based in the first instance on the estimated amount of the wages paid by them during the year, and which are subsequently corrected

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.
(3) [1926] A. C. 281.

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at the end of the year so as to accord with the actual amount of the wages paid, the owners paying or receiving in cash any difference between the amount of the estimated and the actual wages paid; and the ordinary calls which are made for that purpose of fixing the premium deal with the ordinary accidents to one or two workmen. But that is not all that such colliery owners desire to be insured against. It is unfortunately common knowledge that in certain states of the atmosphere there may be terrible explosions of gas in a colliery which may kill practically every man engaged in it, and inasmuch as it depends on the state of the atmosphere similar accidents may occur in possibly two or three collieries in the same district, the atmosphere being the same, and, now that compensation to a workman and his dependants may run up to 600*l.* in case of death, an accident which results in the death of two or three hundred men may involve terrible pecuniary liability, as well as a terrible disaster by the loss of human life, and so this Association not merely provides for the single accidents which kill one or two, and which involve a limited amount of compensation, but for a greater disaster to human life, which may have a great pecuniary result. Para. 5 (*e*) of the Association's special case states: "The area in which the mines of the members were situated had been liable at intervals to calamities involving a large number of fatalities. In order to safeguard the position of the Association in the event of such a calamity happening in the mine of one of its members, it was necessary for the Association to form a reserve fund." The reserve fund was made up in two ways. If in the year there was an excess of receipts over expenditure, the balance was carried to the reserve fund. That balance was generally small, and so extraordinary calls were made and paid direct into the fund, with the result that a reserve fund was built up, the object of which was to provide insurance against these terrible and extensive calamities, but not to do so by making a sudden call, in the year in which the calamity happened, for a very large amount on each member, but by requiring the payment of an additional premium each year, so that the pecuniary

burden of such a calamity might be spread over a number of years. So that it seems to me that this reserve fund is exactly in the same position as a life insurance fund. The premiums are paid against an event which may occur years after, and a reserve fund is thus gradually built up, out of which a large sum may be available for a payment in any year, possibly two or three payments, if there are two or three accidents in the same year. What is to happen to this reserve fund? If a member withdraws he gets back a share of it, but he does not, as one might be disposed to think, get back a larger share the longer he has been a member and the more he has paid into the fund. He gets back a smaller share the longer he has been a member. If he withdraws within five years, he gets three-fourths of his share of the reserve fund; if he withdraws within ten years, he gets back one-half; if he withdraws after ten years, he gets back one-fourth; and for the reason that during the five, or ten, or fifteen years he has had protection by his payments against this great calamity, and the longer he has had protection, the less he gets back out of the reserve fund. This reserve fund seems to me exactly to fall into the same position as the life fund, which was held not to be liable to taxation in *Last's* case (1), and which was not said to be liable to taxation in *Styles'* case. (2)

Now when we have reached that stage it seems to me quite clear—so clear that I was not surprised that Mr. Hills took some hours in arguing the contrary—that the sum which the assured pays for protection against the risk of having to pay for the extraordinary calamity in the shape of extraordinary calls, is the cost of insurance which he is entitled to deduct as his trade expenses. That disposes of the first case.

It seems to me also clear that the reserve fund which it is sought to tax in this case is a sum gathered up to provide against an ultimate possible liability, exactly in the same way as a fund composed of life insurance premiums, built up to provide against an ultimate loss, is not subject to taxation, qua fund, to income tax. I have no doubt this company is

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

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having to pay on its income on investments, just as a life insurance company does, but it appears to me it is quite clear on the line of authorities that this fund cannot be taxed in the hands of the insurance company, because, as was said in *Last's* case (1), it does not represent profits on which income tax is payable. It is the ultimate provision for the payment of the liabilities which the Association has undertaken by reason of its having received premiums year by year.

For these reasons it seems to me that Rowlatt J. was right in both the cases, that the assured is entitled to deduct the premiums, both ordinary and extraordinary, which he pays, as the cost of the insurance, and that the Association is not taxable on this reserve fund, because it does not represent profits liable to tax.

I agree that both appeals should be dismissed, with the usual consequences.

ROMER J. I agree. On the first appeal I have come to the conclusion, for the reasons given by the Master of the Rolls and Scrutton L.J., that the payments made by the colliery company to their protective Association, which is the respondent in the second appeal, are payments for insurance and nothing more. In other words, that they fall within what Rowlatt J. has called the category of genuine insurance premiums, and I share the difficulty which that learned judge felt in seeing how these payments are taken out of that category merely because some part of them—no one at present knows how much—may at some time hereafter —no one at present knows when—be returned to the colliery company.

On the second appeal it appears to me that the case differs in no respect that is material for the present purpose from that of the *New York Life Insurance Co.* v. *Styles*. (2) It is true that in that case the excess of the premiums paid over the expenditure properly payable out of those premiums was ascertained and the excess refunded in cash or in account to the persons who paid it annually, whereas in the present

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

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case the refunding, if it ever takes place, will take place at some time in the future; but as I read the speeches of the noble Lords who formed the majority in *Styles'* case (1), the decision would have been precisely the same if the excess had been ascertained and refunded quinquennially, or at even more distant dates. I agree that both appeals should be dismissed.

Appeals dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *W. P. Ellen, for Peace & Darlington, Liverpool.*

W. I. C.

[IN THE COURT OF APPEAL.]

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GREENHILL *v.* FEDERAL INSURANCE COMPANY, LIMITED.

Insurance (Marine)—Goods—Injury by Pre-carriage—Material Fact—Non-disclosure—Waiver—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 18.

A consignment of celluloid, which had suffered injury by reason of a protracted voyage from New York to Halifax, Nova Scotia, was insured by its owners for a further voyage from Halifax to Nantes without disclosing the fact of the pre-carriage:—

Held, that the pre-carriage was a fact material to be disclosed to the underwriters by the owners when effecting the policy; that, in the circumstances, there was nothing to put the underwriters on inquiry or otherwise constitute a waiver by them within s. 18 of the Marine Insurance Act, 1906; and that the underwriters were not liable.

The statement of Lord Ellenborough in *Boyd* v. *Dubois* (1811) 3 Camp. 133, 134, that insurers "were not bound to represent to the underwriters the state of the goods," in so far as it may be an authority for a proposition that a person tendering cargo for insurance is never bound to tell the underwriter the condition of the cargo, examined and disapproved.

APPEAL from Branson J.

This was an action by the assured upon a policy of insurance effected with the defendants in respect of a consignment of celluloid on a voyage from Halifax, Nova Scotia, to Nantes. The policy contained a clause "subject to particular average

(1) 14 App. Cas. 381.

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if amounting to 3 per cent., each case or shipping package separately insured." The defendants denied liability, alleging in para. 5 of the points of defence that "at the time of the insurance being effected the assured wrongfully concealed from the defendants certain material facts then known to the assured and unknown to the defendants." The material fact was that the goods lying at Halifax had suffered from pre-carriage, in the following circumstances:—

The celluloid in question had been loaded at New York upon a ship, the *Julienne*, which was a vessel primarily designed and used for transit on the great lakes of America. On August 22, 1918, she sailed from New York for Sydney, Cape Breton. The next day she put into New London for repairs to her circulating pump, and remained there until September 6, when she left for Sydney, which she reached on September 16. Being too slow, she was not allowed to join the convoy across the Atlantic, and she remained at Sydney until November 16, and then sailed for Halifax, where she arrived on November 18, and lay there until December 7, when the cargo was discharged.

The evidence showed that celluloid, although only slightly affected by fresh water, becomes seriously injured by contact with salt water. There was no doubt that part of the celluloid had been carried on deck from New York to Sydney, and that at Sydney the goods remained as they had been stowed, and were not unshipped. The same state of things continued at Halifax until December 7, when the celluloid was unloaded, part being stowed in a warehouse, and the rest being left on the quay, part of it covered with a tarpaulin, but that portion which had been on deck was left without any covering at all.

The celluloid was subsequently shipped upon the steamship *Watuka*, which sailed from Halifax on January 29, 1919, for Nantes, upon the voyage the subject of the policy in this action.

At the trial of the action Branson J. came to the conclusion that there had been no disclosure of the pre-carriage of the goods, and that it was a material fact, and he dismissed the action.

The plaintiff appealed. The appeal was heard on March 16, 17 and 18, 1926.

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Schiller K.C. and *Porter K.C.* for the appellant. It is said that the appellant ought to have disclosed the fact of the pre-carriage. Assuming that the disclosure of that fact was material, the burden of proof that it was not disclosed lies on the underwriters, and they have failed to discharge it. At the trial neither the broker nor the underwriters' representative had any recollection of what took place when the insurance was effected.

Further, if the underwriters wanted to know whether there had been pre-carriage they should have made inquiries. They must have known, from the nature of the goods, that they could not have been at Halifax, unless there had been pre-carriage either by rail or water. By not making inquiry, the underwriters must be taken to have waived disclosure. The appellant was not bound to disclose the fact of pre-carriage either under s. 18 of the Marine Insurance Act, 1906, or otherwise, unless the underwriters made inquiry: Duer on Marine Insurance (1846), vol. ii., § 40, p. 444; Phillips' Law of Insurance, 5th ed., vol. i., § 611, p. 329. There is no suggestion here that the goods perished from any inherent vice. The shippers were not bound to disclose to the underwriters the state of the goods: per Lord Ellenborough in *Boyd* v. *Dubois*. (1) So far as that decision is concerned, the law has not been altered by the Marine Insurance Act, 1906.

[SCRUTTON L.J. referred to *Haywood* v. *Rodgers*. (2)]

That was a case of warranty of seaworthiness. Here there is not any warranty; the question is what quantum of disclosure is necessary, and on the authorities it is not necessary to disclose the condition of goods shipped: *Boyd* v. *Dubois* (1); *Koebel* v. *Saunders* (3), which latter is no qualification on *Boyd* v. *Dubois* (1), and is a stronger case in favour of the appellant. *Boyd* v. *Dubois* (1) was not qualified by *Carr* v. *Montefiore* (4) for the purposes of this case; it

(1) (1811) 3 Camp. 133, 134.
(2) (1804) 4 East, 590, 597.
(3) (1864) 17 C. B. (N. S.) 71; 33 L. J. (C. P.) 310.
(4) (1864) 5 B. & S. 408.

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has never been dissented from in terms, and there is no authority cited in books since in which it has been held that it was material to disclose the pre-carriage of goods. It was referred to and accepted as good law in *Mann Macneal & Steeves* v. *Capital and Counties Insurance Co.* (1)

Further, there has been in all the circumstances a waiver by the underwriters of any disclosure. They must have known there had been pre-carriage, and by not making inquiry they waived disclosure: *Carter* v. *Boehm* (2); *Beckwith* v. *Sydebotham* (3); *Fort* v. *Lee* (4); *Mann Macneal & Steeves* v. *Capital and Counties Insurance Co.* (1)

Miller K.C. and *Keogh* for the respondents were not called upon.

LORD HANWORTH M.R. This is an appeal from Branson J., who in a very careful and helpful judgment has gone through the whole of the facts and the contentions which were placed before him, and for my part I am ready to adopt his judgment, and to say that I agree with its conclusions.

For the purposes of the presentation of the case to this Court, some of the points which were discussed before Branson J. were not insisted upon, but the main point argued before us has been the question whether or not the learned judge ought to have found, upon the evidence and materials before him, that there was a wrongful concealment from the defendants of the material facts.

It is clear from the authorities that the onus lies upon the defendants of establishing the plea introduced into para. 5 of their defence—a plea which is to be found in the old Bullen and Leake's Precedents of Pleading—and that what they have to prove is that there was a wrongful concealment by the plaintiffs from the defendants of a fact then known to the plaintiffs, and material to be known to the defendants and material to the risk of the policy. [His Lordship then stated the facts as set out above, and after referring to the evidence

(1) [1921] 2 K. B. 300.
(2) (1766) 3 Burr. 1905.
(3) (1807) 1 Camp. 116.
(4) (1811) 3 Taunt. 381.

summarized by Branson J. in his judgment continued :] Branson J., having considered that evidence, came to the conclusion that there was no disclosure, and he accepted the evidence—as we also must—that the pre-carriage on the *Julienne* was a material fact. Therefore the defendants have established that there was non-disclosure of a material fact in a contract which is a contract uberrimae fidei, and in respect of which disclosure ought to be made ; and disclosure, moreover, of facts then known to the plaintiffs, who were persons endeavouring to insure this cargo, which had made the transit from New York via Sydney (Cape Breton) to Halifax, and which had been lying at Halifax for some time owing to the difficulty then arising from the condition of shipping in finding a vessel to take it from Halifax to Nantes.

Prima facie, therefore, the defendants have established the defence that they set out to prove, and they are released from their contract of insurance.

The law as stated on this point is to be found in s. 18 of the Marine Insurance Act, 1906. Sect. 18, sub-s. 4, provides that " whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact." As I have pointed out, it has been found in this case—and, indeed, it is agreed to by both sides—that this circumstance of the pre-carriage of the goods was a material fact to be disclosed. Therefore, prima facie, the defendants succeed ; but it is said that under s. 18, sub-s. 3 (*c*), there has been a waiver upon this point. Perhaps I ought to refer to sub-s. 2, which summarizes the law in this way : " Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

It is said that, this being an insurance upon goods, there was no duty to disclose the matter of the pre-carriage. I have already pointed out that within s. 18 the pre-carriage has been found to be a material fact ; but it has been much pressed in argument that s. 18 is no more than a statement of the law, and that you must therefore go back to the earlier

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authorities to see how the law stood; and that in *Boyd* v. *Dubois* (1) there is a definite statement by Lord Ellenborough that it is not necessary for the assured to make a representation as to the state of the goods.

Boyd v. *Dubois* (1) has had a history. It is important to observe that the report of the case is of the trial at nisi prius, at a time when Lord Ellenborough tried four cases which appear in the same book, all reported as having been tried on the same day. In *Boyd* v. *Dubois* (1) an action was brought on a policy of insurance on certain hemp. A fire broke out in the hold, which consumed the greater part of the cargo, including the hemp, but the origin of the fire could not be discovered. The defendant's counsel undertook to prove that the hemp was damaged, and that for this reason it was apt to ferment and take fire; that its condition had not been communicated to the underwriter; and that the fire actually had originated in the hemp itself. Lord Ellenborough said: "I most positively say, that they were not bound to represent to the underwriters the state of the goods."

If that is to be taken as meaning that the insurer is not bound to state a fact relating to the goods which is estimated as material to be known to the underwriters, it appears to me that that statement is too wide and too large to be accepted as an authority either at that date or the present. If it is so to be interpreted, it appears to have been received with hesitation by two great judges.

In the year 1864—and, so far as I can discover, not until that time—*Boyd* v. *Dubois* (2) was considered. In May of that year Sir Alexander Cockburn in *Carr* v. *Montefiore* (3) referred to it in these words: "On the second point, I do not think that we are called on to pronounce an opinion on the matter decided in *Boyd* v. *Dubois*. (2) It seems to me a strong proposition to say that where goods are insured, and when shipped are in such a condition as to contain in themselves the germ of their own probable destruction, that is a matter which need not be brought to the knowledge of the

(1) 3 Camp. 133, 134. (2) 3 Camp. 133.
(3) 5 B. & S. 408, 423.

underwriters. If it were necessary for the decision of this case to carry that dogma to its full extent, I should like time to consider." I very respectfully desire to associate myself with Sir Alexander Cockburn, and under his protection to suggest that the words of Lord Ellenborough cannot be interpreted as meaning that they are to apply to a material fact which has been proved—and, as in this case, agreed on both sides—to be material.

In June of the same year, in *Koebel* v. *Saunders* (1), *Boyd* v. *Dubois* (2) was again considered by Willes J., who says: "It is a sufficient answer to the assured to show that the vessel was unseaworthy when she sailed on her voyage, without going on to show that the damage sustained was the consequence of that unseaworthiness." He is there dealing with the unseaworthiness of the vessel, as to which there is a warranty, which renders it unnecessary to say more. Then in the next sentence, when dealing with the insurance of goods, he says: "But in the case of an insurance on goods, it is no answer to say that they were in an unfit condition to be shipped, unless it is shown that the loss arose from that unfitness"; that is, from their inherent vice. But when he concludes the matter by summing up in his judgment he says: "And suppose the vessel caught fire in the course of the voyage from some cause altogether remote from the condition of the cargo. That would be a case in which—fraud or misrepresentation or concealment apart—the underwriters would be clearly liable, unless we are to introduce the new implied warranty which is attempted to be set up here." It appears to me that Willes J., when he puts that parenthesis relating to "fraud or misrepresentation or concealment apart," is expressly reserving the point that there may be some material fact which ought to be disclosed, and in respect of which, if it is found that there is concealment, there would be sufficient to avoid the policy.

Those two great judges have to my mind clearly indicated that the passage in Lord Ellenborough's statement in *Boyd* v.

(1) 17 C. B. (N. S.) 71, 77, 78. (2) 3 Camp. 133.

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Dubois (1) is not to be taken as complete, or as being as wide as, ex facie, it appears to be. In other words, that it is not to be taken as excluding the duty of disclosure of material facts, where there are facts found to be material and known to the assured at the time when the policy is entered into.

It appears to me, therefore, that s. 18 of the Marine Insurance Act, 1906, correctly summarized the law as it stood before the Act was passed; but even if that be not so, the short way in which Branson J. has put it is, in my opinion, correct. We have to take that statement of the law as found in the Act of 1906, and that is binding upon us. The addition that I make is this, that it does not go beyond what I believe to be the law as explained in the two later decisions to which I have referred. Perhaps I might add that in its very nature the fact is material, because it is necessary for the insurer to decide both whether he will undertake the risk, and, if so, at what premium. And unless he has before him what is determined to be a material fact, he has not the basis upon which he can come to that conclusion.

On the question of waiver, upon which counsel insisted, it appears that the presentment of it in this Court, carried to its logical conclusion, would mean that the doctrine of waiver would extend to a point at which the duty of disclosure in these contracts uberrimae fidei would be cancelled.

It is said that in this case there must have been a waiver. Branson J. puts it clearly—" must be taken to have known, and by not enquiring as to how the goods got to Halifax "—and they must have reached Halifax by some transit by sea —" the insurer waived all information as to their previous history." And upon that proposition attention was called to *Mann Macneal & Steeves* v. *Capital and Counties Insurance Co.* (2) That was a case of an insurance upon hull and machinery, and it was held in the Court of Appeal that the policies were valid, because the underwriters, by abstaining from inquiry, had waived the disclosure of the engagement to carry petrol. Bankes L.J. refers to *Boyd* v. *Dubois* (3),

(1) 3 Camp. 133, 134. (2) [1921] 2 K. B. 300.
(3) 3 Camp. 133.

and he appears to refer to it, not for the purpose for which I have already discussed it, but upon the question whether or not there is a duty to make any disclosure in respect of the cargo which is to be carried, in the case of an insurance upon hull and machinery—not in relation to the question of the nature of that cargo in the case of an insurance upon that cargo itself. He says that if duty there be, that could only be a duty, in so far as the insurance on hull goes, in respect of a cargo already fixed and undertaken to be carried. I confess that I do not find any passage in that case which assists or governs the present case, where we have to consider whether or not there was a waiver of the disclosure of this material fact.

Now, there may be a waiver of information concerning facts which belong to the very nature of the goods. Lord Mansfield, in *Carter* v. *Boehm* (1), says this: the underwriter "needs not be told the secret enterprizes they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information." It may well be, following that rule of Lord Mansfield's, that if an underwriter is told of the cargo, a cargo (we will say) of some chemical substance of which he has had no previous experience, and makes no inquiry about it, then from the nature of his contract, without being told, he waives the information. He does not care to inquire what is the particular nature of the cargo. But we are not dealing with such a case here: we are dealing with a cargo which has had a history, which has had pre-carriage with many incidents, and of which its voyage upon the *Julienne* has been deemed on both sides, by those who are engaged in insurance matters, to be material to be known. I cannot find that that type of incident is included in the nature of the contract itself. It seems to me to be something outside and beyond, and something which ought to be told, and cannot be deemed to be waived because it has not been mentioned. It is not an incident which may be supposed to have taken place, or one which could have been found out

(1) 3 Burr. 1905, 1910.

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from the mere fact that the policy was upon a cargo of celluloid.

Branson J., to my mind, puts the matter very clearly and very well in his judgment. I do not think it is necessary to deal further with that point, except to agree with Branson J. in saying that there has not been in this case a waiver within the meaning of s. 18, sub-s. 3 (*c*), on the part of the insurer.

For those reasons it appears to me that the judgment of Branson J. was right, and, therefore, that this appeal must be dismissed with costs.

SCRUTTON L.J. I have arrived at the same conclusion as that to which Branson J. came in his very careful and helpful judgment; and I only express my judgment in words of my own, because the subject-matter has an importance which goes beyond this case.

The material question is, whether a policy on a certain cargo of celluloid on a voyage across the Atlantic has been avoided by non-disclosure, which involves the questions whether there was any duty to disclose the particular fact, whether the particular fact was material to the risk, and whether, if there was a duty to disclose, it was waived by some action of the underwriter.

The facts are these: just before the armistice it is common knowledge that the transit of cargo across the Atlantic was a matter of difficulty. Ships were scarce; they had to start under convoy; they had to get to some point in British North America to join their convoy; and great quantities of goods were trying to get across the Atlantic. Amongst other goods was a large parcel of celluloid in New York, which had been there for some time. After considerable difficulty in getting a ship, it was at length shipped on a lake steamer called the *Julienne*, a vessel primarily used for transit on the great lakes of America, though she had crossed the Atlantic from England to get there; and that vessel left New York for Sydney, Nova Scotia, on August 22. When she left she was so heavily overloaded, that when she reached the end of her voyage, having consumed a considerable proportion

of her fuel, her load line was a foot under water, and it must therefore have been considerably more under water when she started. She proceeded on her voyage from New York, and at the end of the first day she had to put into New London with a broken down engine, and she stayed there from August 23 till September 6. She left there on September 6, and reached Sydney on September 16, having proceeded on her voyage at the magnificent rate of 3½ knots an hour. With that speed, it is hardly necessary to say that the officer commanding the convoy would have nothing to do with her, because a convoy that only proceeded at 3½ knots an hour would be an easy prey for any German submarine that happened to be in the neighbourhood. So she was not allowed to join the convoy.

I should have mentioned that while the owners of the celluloid attached great importance to the cargo being under deck, there is no doubt that some of the cargo was on deck. In the course of the correspondence the representative of the cargo owners says: "We paid for under deck space and got a positive guarantee from the Central Transportation, through Brown Brothers & Co., that every case of ours would be under deck. I absolutely refused to deliver a case to the ship unless we had this guarantee. When the ship arrived at Halifax Campbell reports that many of the cases had been stowed on deck. Of course, if we had gotten into an argument with the insurance underwriters, they would have learned this fact, and it is a question how much insurance would have been vitiated."

Celluloid appears to be very susceptible to salt water, but fresh water only slightly affects it to this extent, that if it is polished celluloid, the fresh water may dim it, and it may have to be repolished. It does affect it, but slightly. So far, we have it that some of the celluloid cargo was on deck, and therefore exposed to salt water.

The vessel reaches Sydney (Cape Breton) on September 16, and she lies there till November 16, with her deck cargo exposed all the time to the risk of any spray in gales. She then starts for Halifax, there being no chance of her getting

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across from Sydney, because the captain declines to take her, and the crew will not go across the Atlantic in winter. She arrives at Halifax on November 18. She lies there, still with her cargo on deck, till December 7, and then the cargo is discharged, and is stacked, considerable portions of it in the open, and the portion that has been on deck, with no covering over it at all, until the beginning of February. There is evidence that the weather during December and January was what you might expect in that region at that time. The representative of the cargo owner, who went there at the beginning of January, bewails his sad fate, because he left spring-like weather in New York to find a temperature of 20° below zero at Halifax, and he had to go and inspect the goods in the open in a very heavy snowstorm. I think we can have no doubt, so far, that at the end of January that celluloid cargo had been through what one of the witnesses describes as an astonishing voyage, and what one of the plaintiffs' own letters describes as an abnormal voyage. And the question is whether, when on January 29, 1919, the celluloid cargo, which was then going to be shipped in the *Watuka*, was insured for that voyage, there should have been disclosed to the underwriters the fact that the cargo had gone through that voyage which I have described before it was shipped at Halifax.

Now, insurance is a contract of the utmost good faith, and it is of the gravest importance to commerce that that position should be observed. The underwriter knows nothing of the particular circumstances of the voyage to be insured. The assured knows a great deal, and it is the duty of the assured to inform the underwriter of everything that he is not taken as knowing, so that the contract may be entered into on an equal footing. It has been expressed by many writers and in many text-books; but I think it has been as well expressed by Park J. as by anybody, when he wrote Park's Marine Insurances, in Chapter 10, which is headed "Of Fraud in Policies," for at that time and for a considerable portion of the last century, concealment was always placed under the head of fraud. He says on p. 403: "No contract can be good, unless

it be equal; that is, neither side must have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person insured, and therefore it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete. Accordingly the learned judges of our Courts of Law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith and the strictest integrity, have constantly held that it is vacated and annulled by any the least shadow of fraud or undue concealment." Again, on p. 408: "The second species of fraud, which affects insurances, is the concealment of circumstances, known only to one of the parties entering into the contract. Upon this head, the principles of law are perfectly clear, free from doubt or possibility of error. Concealment of circumstances vitiates all contracts, upon the principles of natural law. Insurance is a contract of speculation. The facts, upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter must therefore rely upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate. If a mistake happen, without any fraudulent intention, still the contract is annulled, because the risk is not the same which the underwriter intended. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his belief of the contrary." That being the general principle which appears in s. 18 of the present Marine Insurance Act as, "the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured," the question is, was the previous history of this celluloid, the voyage on the *Julienne*, by which it had reached Halifax, and the circumstances of the risk to which it had been exposed before it was shipped, material?

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This case is rather novel. I have never heard a case like this before. Each side insists, vigorously, that the pre-carriage was a most material circumstance. I have never had a case where both sides have come solemnly protesting that it was a most material circumstance. The two parties who effected the insurance, the broker for the shipper, and the person who underwrote for the underwriter, each say that it was most material to know of the previous history of the *Julienne*; and they do it for this reason, that each of them says: "I do not remember anything about this particular case." But the broker for the assured says: "It is so material that of course I disclosed it," or, to use a phrase which has been used in another connection, "I am an honest broker, and an honest broker would of course disclose this most material question as to the previous voyage of the *Julienne*." Then, says the representative of the underwriter, "If I had known this, I should never have dreamed of writing the policy." In fact the plaintiffs' witnesses say that Chubb & Sons, who are one of the best known firms of underwriters in the United States, had refused an insurance on cargo on the *Julienne*, "and," says the representative of Messrs. Chubb, "of course I was not told this. Do you suppose that I should have written at the ordinary rate of premium an insurance on a cargo which I knew had been through this extraordinary voyage on the *Julienne*?" And he adds: "Of course I was not told that. I do not remember about it, but of course I was not told it, because, if I had been, not only should I not have written it at the ordinary rate, but I should never have written it at all." One is therefore rather relieved from examining whether the circumstance was material.

Then the next question is, being material, was it disclosed? Here there is a conflict of evidence, in the sense that I have stated, that one side says: "I must have disclosed it, although I do not remember it," and the other side says: "It cannot have been disclosed, or I should have never written the insurance." But having read the evidence on each side, I agree with the conclusion to which Branson J. has come,

that it was not disclosed. I am influenced in that, first by the rate of premium, because it is inconceivable to me that the ordinary rate of premium should be charged for a cargo as to which an underwriter knew that all that had been on deck had been exposed to sea water for a very considerable time, and that all that had been stacked in the open had been exposed to fresh water, rain and snowstorms for a considerable time at Halifax. I am also influenced by the fact that when in the Commercial Court it was proposed to give evidence by affidavit, the broker for the assured had his attention called to what it was desired that he should say about the insurance and the disclosure, and, having his attention called to it, he said nothing, and explained that he said nothing, because he could not find any reference to the matter in the documents, the inference being that there would certainly have been a reference to the matter in the documents if he had disclosed it. I should not in any case interfere with the learned judge who heard the two witnesses, but those circumstances induce me to take a strong view that the learned judge was right in the conclusion to which he came.

Then, here is a material circumstance not disclosed. What is the excuse of the assured ? As I followed the argument of Mr. Schiller and Mr. Porter, it ran on two lines : First of all, *Boyd* v. *Dubois* (1), the decision of Lord Ellenborough, which has stood for one hundred years and is quoted in all the text-books, shows that there was no obligation to disclose. Secondly, if there was an obligation to disclose, following the classical passage of Lord Mansfield in the case of *Carter* v. *Boehm* (2), the underwriter waived disclosure.

The first line of argument requires the consideration of the authority of *Boyd* v. *Dubois* (1), which, although it is a hundred years old, has had a somewhat eventful life. In *Boyd* v. *Dubois* (1) a ship had been lost by fire. There was a policy of insurance upon hemp. The underwriters proposed to prove that the hemp was damaged, that for this reason it was apt to ferment and take fire, that its condition had not been communicated to the underwriters, and that the fire

(1) 3 Camp. 133, 134. (2) 3 Burr. 1905.

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actually had originated in the hemp itself. It is a report of a trial at nisi prius, and oddly enough, the defendant's counsel does not seem to have proposed to prove that the assured knew of the condition of the hemp, which one would have thought was a somewhat material matter. That is left out, either out of his contentions or out of the report of his contentions; but there was no proof that the fire had originated from the damaged state of the hemp. The case was tried with a jury, and seven lines of Lord Ellenborough's statement are printed by Lord Campbell, whether as an interlocutory remark or in his summing up to the jury, does not appear. There is nothing else printed that was said by Lord Ellenborough. He said this: "If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned,"—that is the ordinary implied contract that you cannot recover for loss occasioned by a defect of the goods insured—"But I most positively say, that they were not bound to represent to the underwriters the state of the goods. It would introduce endless confusion and perpetual controversies, if such a duty were to be imposed upon the assured." Those four lines have ever since been quoted by every text writer, generally without comment, as establishing that an assured insuring a cargo is under no obligation to tell the underwriter of any defect in the cargo which may increase the risk.

I asked the learned counsel who argued the case on behalf of the assured this question: "Supposing it was an insurance on cattle against mortality, and the assured knew that the cattle had come to the port of shipment in a ship or a train infected with foot and mouth disease, would they be bound to disclose it?" and Mr. Porter, although he had the backing of Lord Ellenborough, was unable to say that the assured would not be bound to disclose it. It seems to me obviously to be a fact of which the assured would be bound to inform the underwriter if he knew it. Curiously enough, although Lord Ellenborough is reported as making that positive remark,

he has used language himself which is quite inconsistent with the remark that he then made. Seven years before, in *Haywood* v. *Rodgers* (1), Lord Ellenborough had given a judgment that where there was an implied warranty in the policy as to the seaworthiness of the ship, the assured was not bound to disclose facts which would be a breach of the warranty, because those facts afforded the underwriter a defence to any action on the policy. Oddly enough, Lord Ellenborough does not seem to have considered, and the text writers do not seem to have considered, that such a fact was of no use to the underwriter unless he knew of it; he could not use it as a defence to an action on the policy unless he knew that there was such a fact; and it was not very much good to him to be told that he had a defence, of which he did not know and which he could not use. But the reason why I cite the case—and it is no good saying it is bad law now, because it is in the Marine Insurance Act—is because it is a reserved and considered judgment by Lord Ellenborough, and the last passage of his judgment is this: "We think that an assured having impliedly warranted as he has his ship to be seaworthy, and having concealed no circumstance relative to the seaworthiness of the ship which he was required to disclose, and not having, at the time of effecting the policy, known of any fact which rendered her, with reference to the risk insured, otherwise than seaworthy, is entitled to retain the benefit of that verdict." I asked the learned counsel why on earth Lord Ellenborough put in that passage, "not having at the time of effecting the policy, known of any fact which rendered her, with reference to the risk insured, otherwise than seaworthy," if the assured was under no obligation to disclose such a fact, although he did know it? It seems to me that that passage represents what is the law, that if you know of a fact which materially affects the risk, you are bound to disclose it.

Boyd v. *Dubois* (2), being a nisi prius case, has, with one exception, been cited by the text writers without any comment. Lord Ellenborough went on to say: "It would

(1) 4 East, 590, 599. (2) 3 Camp. 133.

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introduce endless confusion and perpetual controversies, if such a duty were to be imposed upon the assured." Mr. Duer, in citing *Boyd* v. *Dubois* (1) in his book on Marine Insurance, does say that he cannot see why it should raise endless confusion and controversy, considering that there is such a clause in all the foreign codes, and it does not raise endless confusion and perpetual controversy. But notwithstanding that, *Boyd* v. *Dubois* (1) is cited in the textbooks, and stays there without comment. But it did not stay without comment in the reports.

First of all, as my Lord has said, the Court of King's Bench doubted it in the case of *Carr* v. *Montefiore* (2), where Cockburn C.J. says: "It seems to me a strong proposition to say that where goods are insured, and when shipped are in such a condition as to contain in themselves the germ of their own probable destruction, that is a matter which need not be brought to the knowledge of the underwriters." Sir James Shaw Willes J. used language inconsistent with it when, sitting in Common Pleas, he gave the first judgment of the Court in *Koebel* v. *Saunders* (3), where he put the case that, though there was an implied warranty of seaworthiness of the ship, there was no implied warranty that the goods were fit for the voyage, the effect of which of course would be that, there being an implied warranty as to the ship, if it was broken the policy was void, though the breach had nothing to do with the loss; but that in goods, there being no implied warranty at all as to seaworthiness, the fact that the goods were not fit to stand the voyage would not of itself be a defence to an action on a policy, unless you showed one thing, that the unfitness caused the loss. But Sir James Shaw Willes J. said that there would be another defence. "Suppose a cargo of cotton was loaded at New Orleans for this country, and was loaded there in a damp state, so as to be liable to spontaneous combustion, and so that there would be a strong probability that it would catch fire before the end of the voyage, but the dampness of the cotton when put on

(1) 3 Camp. 133. (2) 5 B. & S. 408, 423.
(3) 33 L. J. (C. P.) 310, 312.

board was not known to the assurer, and consequently it was not a case of fraud." And again: "And therefore in the absence of fraud the insurers would be liable." If Sir James Shaw Willes J. was agreeing with *Boyd* v. *Dubois* (1) there was no need to have put in that paragraph about concealment, because there would have been no obligation to disclose the condition of the cotton if *Boyd* v. *Dubois* (1) was good law.

Therefore *Boyd* v. *Dubois* (1) has been doubted by Cockburn C.J., and there is a passage inconsistent with it in the judgment of Sir James Shaw Willes J.

Lastly, there is the decision of the Court of Appeal in *Mann, Macneal & Steeves* v. *Capital and Counties Insurance Co.* (2), where there was an insurance on a ship, and the question was whether the person effecting the insurance on the ship was bound to disclose the engagements she had for cargo. *Boyd* v. *Dubois* (1) was cited, but not any of the authorities in which it has been doubted. In spite of that, the Court arrived at the same result. Bankes L.J. said this: "The plaintiffs' case was that in the case of an insurance upon hull it was no part of the duty of the assured to make any disclosure to the underwriter with reference to the cargo, but that it was the underwriter's business, if he wished to know anything as to the nature of the cargo, to make the necessary inquiries." That is what Lord Ellenborough says in *Boyd* v. *Dubois* (1): "The defendants' case, on the other hand, was that even in the case of an insurance upon hull it was the duty of the assured to make full disclosure of every material circumstance connected with the cargo to be carried. In cross-examination the witnesses for both parties had to modify the general proposition contained in these contentions. For instance, the plaintiffs' first witness admitted that he could not contend that there would not be a duty to disclose the fact that dynamite formed part of a cargo, or that an entire cargo consisted of petrol; and several of the defendants' witnesses admitted that if quite small quantities of such articles as matches or cotton formed part

(1) 3 Camp. 133. (2) [1921] 2 K. B. 300, 306.

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of a cargo there would be no duty to disclose that fact, though there would be a duty to disclose the fact if considerable quantities of either were to form part of a cargo." Bankes L.J. came to the conclusion that the fact that the underwriter was told that this was a wooden vessel, with auxiliary motor engines which used petrol, put the underwriter upon inquiry and told him of the risk of petrol on a wooden vessel; and if he wanted to know more about the quantity of petrol that was on board, he must ask. Then Atkin L.J. said (1): "I do not think that the reasons I have given for this decision necessarily apply to the case of a cargo which is unusual and of exceptionally hazardous character, such as the case put in argument of a cargo of dynamite. I should like to consider the circumstances of such a case when it arises." So that, without having the decision of Cockburn C.J. cited to them, both those learned judges took exactly the same view, having had *Boyd* v. *Dubois* (2) cited to them, as Cockburn C.J. had taken in *Carr* v. *Montefiore*. (3) I can quite conceive that the proper limitation of *Boyd* v. *Dubois* (2) is this, that if you are told facts about the cargo, and do not know the natural consequences which follow from such facts, you ought to have asked; but if there are unusual circumstances connected with the cargo, which would not follow from the facts that you are told, then they ought to be disclosed. I do not think that *Boyd* v. *Dubois* (2) can possibly be taken as authority for a wider proposition than that, and it certainly in my view cannot be taken as an authority for a proposition that a person tendering cargo for insurance is never bound to tell the underwriter the condition of the cargo. If it is supposed to decide that, *Boyd* v. *Dubois* (2), in my opinion, is wrong.

The first argument, therefore, that was put forward by counsel for the assured appears to me to fail. There was a duty to disclose this unusual circumstance connected with this shipment of celluloid, that it had been on this extraordinary preliminary voyage for some five months, part of it

(1) [1921] 2 K. B. 313. (2) 3 Camp. 133
(3) 5 B. & S. 408.

exposed to salt water for a very considerable length of time, part of it exposed to fresh water and storms, unprotected, except by its wooden cases, for another considerable length of time.

That only leaves the last contention put forward, which probably was intended to be the appellants' best contention—namely, that there was a waiver. I could understand that the way in which cargo is tendered may put the underwriter on inquiry. For instance, this celluloid shipment appears to have a variety of odd names, of which I have never heard before, and of which I daresay a good many people have never heard—fiberloid, pyralin, and other obscure names. I can conceive that if an underwriter is told, "I propose to ship pyralin," and does not ask, "What on earth is that?" he waives the disclosure to him of the ordinary qualities of pyralin or fiberloid. But if any particular shipment of pyralin or fiberloid has some peculiar quality which would not ordinarily ollow from, or be disclosed by, saying "This is pyralin," it seems to me that that is clearly a matter which ought to be disclosed.

The argument as to waiver was put before us in a way which would, if sound, have entirely destroyed the obligation to disclose at all; because it was said: "It is a possibility that this cargo which you were asked to insure may have suffered certain damage, and as there is a possibility, and you are told of this cargo, and you do not ask the question, you are bound by any possibility which might happen to the cargo." That line of argument would entirely destroy the obligation to disclose at all, because, if you insure a ship, of course it is a possibility that anything may have happened to her. If you come to insure a cargo, it is a possibility that anything may have happened to it. I have always understood the proper line that an underwriter should take, except in matters that he is bound to know, is absolutely to abstain from asking any questions, and to leave the assured to fulfil his duty of good faith, and make full disclosure of all material facts, without being asked. And it seems to me to be of great importance to the general duty of disclosure that that position

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of the underwriter should be maintained, and not whittled away by alleged waiver.

Now, of course, waiver rests upon the classical judgment of Lord Mansfield in *Carter* v. *Boehm* (1), which takes one into another world, because the insurance in *Carter* v. *Boehm* (1) was on behalf of the Governor of Port Marlborough in the island of Sumatra against its being taken by a foreign enemy, a class of insurance with which we are not familiar at the present time. Lord Mansfield was dealing with the question whether a letter from the Governor ought to have been disclosed, saying that there was every chance of the French taking the fort. The letter said: "Now more afraid than formerly, that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention, last year." Another letter quoted by Lord Mansfield notified to the East India Company, "that the French had, the preceding year, a design on foot, to attempt taking that settlement by surprise; and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being badly supplied with stores arms and ammunition." Lord Mansfield, having that insurance before him, delivered the classical passage which is always cited about what an underwriter is taken to know, the special feature being this: "If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere—he needs not be told the secret enterprizes they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to shew it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to shew there will be no deviation." Then previously, on the same page, he says: "The underwriter needs not be told what lessens the risque agreed and understood to be

(1) 3 Burr. 1905, 1913.

run by the express terms of the policy. He needs not be told general topics of speculation : as for instance—the underwriter is bound to know every cause which may occasion natural perils ; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils ; from the ruptures of States ; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace ; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, etc."

But it seems to me to be a very long step from that passage to the conclusion that, if an underwriter is told that there is to be an insurance on some subject-matter, he is to be taken to know every possibility that may have happened to that subject-matter which the assured knows, and which he does not in fact know, because he does not proceed by questions to explore all the possibilities that may have happened to such a subject-matter. Such an argument, such a view of waiver, would, as I have said, entirely destroy, in my view, the obligation to disclose ; and while I pressed counsel to tell me exactly upon what, in the case of cargo which had been exposed to a quite unusual incident, the idea of waiver was rested, I was unable to obtain any satisfactory answer, except —and I do not say that that was satisfactory—the suggestion that you were taken to know of every possible thing which might have happened to the cargo.

For those reasons, the second defence that information was waived, fails. One has then a material fact, a fact material to the risk, both because there was existing damage which might get larger, and because it would be extremely difficult to sort out the pre-existing damage from the post-shipment damage, and therefore the risk of the underwriter might be increased—which would very materially affect the rate of premium. The information was material. It was not disclosed. There was a duty to disclose it, and that duty was not waived.

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For those reasons, which are substantially the same as are expressed in different words in the judgment of Branson J., I think that this appeal must be dismissed with costs.

SARGANT L.J. I agree with the full and careful judgment of Branson J. in this case, and also with the judgments that have just been delivered. It is therefore unnecessary for me to express my views at any length.

That the prior history of the goods in question was, within s. 18 of the Marine Insurance Act, 1906, a material circumstance, which would influence the judgment of a prudent insurer in fixing the rate of premium or determining whether he would take the risk, is clearly shown by the evidence of the brokers on each side; indeed, Mr. Howe, the broker for the assured, relied on his duty to disclose this past history as sufficient to convince him that he must in fact have made the disclosure. But whatever Mr. Howe's personal conviction, the learned judge has found, and in my judgment rightly found on the balance of evidence, that no such disclosure was in fact made. And therefore, on the express language of s. 18, there appears to have been a clear right on the part of the insurer to avoid the contract.

But it is said that the Act of 1906 was merely a codifying Act, and could not have been intended to alter the law as laid down in *Boyd* v. *Dubois* (1), and that that case shows that the past history of goods to be insured, as affecting their existing condition, can never be a material circumstance affecting the insurance, since all that is insured against is the risk of future damage to the goods. But this view leaves out of account an obvious consideration in cases where the damage already sustained may have been of the same kind as that which is likely to be sustained and is insured against—namely, the difficulty which will be thrown on the underwriter of proving that a part only of the ultimate damage had been caused during the currency of his insurance. And it is this very difficulty which, according to the evidence in the present case,

(1) 3 Camp. 133.

would have affected the insurability of the goods had the facts been known.

In my judgment, *Boyd* v. *Dubois* (1), at any rate in view of the subsequent criticisms of it, which I need not repeat, cannot be held to have laid down as an inflexible and universal rule that in no case can the past history of the goods, as affecting the probable condition of the goods at the time of insurance, be a material circumstance. And if it did lay down such a rule, I agree with the learned judge in thinking that the rule has been modified by s. 18, sub-s. 1, of the Act. Under that section, if the history of the goods is found as a matter of fact, as in the case here, to have been a material circumstance, then the result specified in the section must follow.

But it is said that here there was, within s. 18, sub-s. 3 (*c*), a waiver by the insurer of information as to the previous history of the goods so far as pre-carriage was concerned, and this because such goods were known not to have originated in Halifax; that there must have been some pre-carriage; and that it was therefore for the insurers to make inquiries as to the circumstances of such pre-carriage. Had the pre-carriage necessarily or ordinarily involved incidents—vicissitudes—of the same character as those which occurred in the actual pre-carriage here, there would have been much in favour of this argument. But it is clear from the evidence that this is not so, and that the circumstances of the pre-carriage were so exceptional that they would necessarily be material and ought to have been disclosed. Indeed, the argument of the plaintiffs, if pressed to its logical conclusion, would in almost every case negative mere non-disclosure as a defence, since in almost every case appropriate inquiries would have got behind the non-disclosure and have elicited the material circumstances, unless indeed they had resulted in a positive misstatement by the assured.

In my judgment, in such cases, in order that waiver by the insurers should be established, they must at least have received information such as would put an ordinarily careful insurer on inquiry, and nevertheless failed to inquire. The

(1) 3 Camp. 133.

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mere omission to make inquiry where, as here, there was nothing to suggest the possibility or necessity of doing so, cannot in my view be held to be a waiver within s. 18.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Laces & Co., Liverpool.*

R. M.

C. A. 1926 *May* 12, 13.

[IN THE COURT OF APPEAL.]

REED (INSPECTOR OF TAXES) *v.* SEYMOUR.

Revenue—Income Tax—Profit from Employment—Proceeds of professional Cricketer's Benefit Match—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1.

A professional cricketer in the service of the Kent County Cricket Club might, by the rules of the club, be granted a benefit, but this was on the express understanding that he allowed the proceeds to be invested in the name of trustees of the club during the pleasure of the committee. The invested sum was always, however, eventually handed over to him when his career as a cricketer was over, or when he found an investment of which the trustees approved.

The respondent, a professional cricketer in the employment of the club, was granted a benefit, the proceeds from which, together with subscriptions, after being held by the trustees on certain securities, were eventually handed to the respondent and applied by him in the purchase of a farm. The respondent having been assessed under Sch. E, r. 1, of the Income Tax Act, 1918, on so much of the fund as represented the gate money at the match:—

Held, by the Court of Appeal (Lord Hanworth M.R. and Warrington L.J.; Sargant L.J. dissenting), that the sum could not be regarded as an extraneous addition to the respondent's wages, or as a fortuitous donation, but was an addition from a match arranged by and through his employers for his benefit and contemplated as a possibility in the terms regulating his employment as one of their staff, and was, therefore, a sum accruing to him by virtue of his office or employment properly assessable under Sch. E, r. 1.

Herbert v. *McQuade* [1902] 2 K. B. 631 applied.

Decision of Rowlatt J. [1926] 1 K. B. 588 reversed.

Per Sargant L.J. dissenting: The circumstances indicated that the gift, which was neither systematic nor recurrent, was a personal present, in the nature of a testimonial or recognition of the respondent's merits,

quite independent of his particular office or employment, and not differing in principle from a sum voted to a successful general on the conclusion of a great war.

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APPEAL from Rowlatt J. (1)

The respondent was a professional cricketer in the employment of the Kent County Cricket Club. In 1920 a match under the direction of the club was played at Canterbury for the benefit of the respondent.

When granting a benefit match to a professional cricketer in their service it was the practice of the club to grant it on the express understanding that he allowed the proceeds of the benefit to be invested in the name of the trustees of the club during the pleasure of the committee. The income derived from the proceeds invested was paid to the beneficiary. The invested sum had, however, always eventually been handed over to the professional cricketer when his career as a cricketer was over, or when he found an investment (such as a share in a business or farm) of which the trustees approved.

The following regulation for the staff of the club, bearing on the point, was in force at the time when the above-mentioned match was played: "The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiary."

The net proceeds derived from the benefit match in question, together with other sums obtained by public subscriptions, were invested by the club during 1920 in the purchase of certain stocks, the dividends on which were received by the club, less income tax deducted, and paid to the respondent. In 1923 these investments were realized, and the proceeds, amounting, with the addition of certain other moneys, to 1914*l.* 14*s.* 5*d.*, were paid by the club to the respondent, and were applied by him, with the approval of the trustees of the club, to the purchase of a farm.

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The net proceeds of the match, apart from the public subscriptions and after entertainment tax, premium on insurance and other outgoings had been deducted, amounted to 939*l.* 16*s.* 11*d.*, and on this sum an assessment to income tax under Sch. E of the Income Tax Act, 1918, for the year 1920–21, had been made upon the respondent, but no assessment had been made against him in respect of that portion of the benefit moneys paid to the respondent which was attributable to the public subscriptions. The respondent appealed to the Commissioners against the assessment.

It was contended by the respondent (*a*) that the net proceeds of 939*l.* 16*s.* 11*d.* were in fact received by him from the funds of the general public and not from the funds of his employers, and that they were therefore not an emolument or profit appurtenant to his employment; and (*b*) that the net proceeds were a donation or gift and not assessable to income tax.

The appellant contended (*a*) that the profit, amounting to 939*l.* 16*s.* 11*d.*, had been awarded by the Kent County Cricket Club to the respondent for services rendered by him as a professional cricketer in their employment; (*b*) that it was a perquisite of his employment; (*c*) that it was assessable under Sch. E; and (*d*) alternatively that it was annual profits or gains assessable under Sch. D.

The Commissioners upheld the respondent's contentions and discharged the assessment, being of opinion that the net proceeds of 939*l.* 16*s.* 11*d.* awarded to him were a donation or gift and not assessable to income tax. On an appeal from them, Rowlatt J. affirmed their decision (1), holding that the respondent was not assessable in respect of the 939*l.* 16*s.* 11*d.*, inasmuch as it was a mere present and not a profit arising from his employment within Sch. E, r. 1.

The appellant appealed. The appeal was heard on May 12 and 13, 1926.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the appellant.
Latter K.C. and *W. T. Monckton* for the respondent.

(1) [1926] 1 K. B. 588.

[Counsel in effect repeated their arguments in the Court below, and in addition to the cases there cited referred to *Inland Revenue* v. *Strang* (1); *Herbert* v. *McQuade* (2); *Poynting* v. *Faulkner* (3); and *Turton* v. *Cooper*. (4)]

LORD HANWORTH M.R. In this case we have to decide a point which is in its nature difficult, and not less so because it wears an appearance of hardship in each particular case.

By the Income Tax Act of 1918 tax under Sch. E should be annually charged on every person exercising an employment of profit mentioned in this Schedule in respect of salaries, fees, wages, perquisites or profits whatsoever therefrom. That word "therefrom" is a slight variation from the old section which stood before the Consolidating Act of 1918 came into force, the words previously being "profits by reason of his office." We have now to consider as taxable "profits whatsoever" from the office which is an employment of profit.

A number of cases have been decided upon these words and on the question of the chargeability of persons holding an employment of profit. The sums that are received in the course of that employment of profit of course vary very largely in their nature, but in the case of *Herbert* v. *McQuade* (5) Lord Collins M.R. laid down what is the test whether a payment falls to be charged or not. "Now that judgment," he says, "is certainly an affirmation of a principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it." The test, therefore, shortly put is: Does the sum accrue to the subject in virtue of his office? If it does, it is taxable.

(1) (1878) 15 S. L. R. 704; 1 Tax Cas. 207, reported sub nom. *In re Rev. George Walter Strang.*

(2) [1902] 2 K. B. 631.

(3) (1905) 93 L. T. 367.

(4) (1905) 92 L. T. 863; 5 Tax Cas. 138.

(5) [1902] 2 K. B. 631, 649.

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That test has received very remarkable testimony of approval. It was approved in *Cowan* v. *Seymour* (1) by Atkin L.J. and the other members of the Court, and in *Poynting* v. *Faulkner* (2) by Cozens-Hardy L.J., and, indeed, in no case that I know of has that test been in any way altered or varied, still less differed from.

On the other side it has been said in *Poynting* v. *Faulkner* (2) that in considering whether a person receives a sum in the course of or as one of the profits of the office or whether he receives it from his personal qualities only, it is fair to say that "the object is that the person who is fit to discharge properly the functions of a minister to a particular congregation should receive an adequate return for his services in that charge. . . . . There may be other balancing circumstances, which would make the personal qualification of the minister so predominant over consideration for the congregation, that in a particular case, if there was a series of facts pointing all that way, they might suffice to turn the balance in the direction of making it purely a personal gift to the minister, and not part of the stipend in return for services to be rendered by him." I have quoted that passage on the other side because I think it may be added to the test laid down by Lord Collins M.R. If, in fact, he does receive it while he is employed and in the course of his employment it would be chargeable, unless there are considerations pointing in the direction of making it a purely personal gift and not part of the stipend in return for the services to be rendered by him.

Perhaps, lastly, I may say that in these cases, as in all other income tax cases, one has to regard the substance of the matter. In *Blakiston* v. *Cooper* (3) Lord Loreburn used the word "substantially" and again applied the test—"what you choose to call it matters little. The point is, what was it in reality?" With those authorities to guide me I approach the facts in the present case.

James Seymour, the respondent, is a cricketer of standing

(1) [1920] 1 K. B. 500.
(2) 93 L. T. 367; 5 Tax Cas. 145, 157.
(3) [1909] A. C. 104.

and position and some celebrity. He was employed as a professional cricketer in the employment of the Kent County Cricket Club, and he received a salary. After he had been in their employ for some years, with the approval and under the auspices of the County Club, a match was played at Canterbury for what is known as the benefit of the respondent. The result of that match was that a large sum—over 1500*l.*—was received as gate money. The match was played under the auspices and I may add the directions of the County Cricket Club, and from that sum there fell to be deducted entertainment tax, insurance premium—I suppose against a wet day—and a number of other expenses, which totalled to the large sum of 628*l.*, leaving a sum of 939*l.*, which was the net sum payable to James Seymour. One of the regulations which apply to the employment of the staff is: "The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiary." Those last words connote the fact that the money has to be handed over eventually to the cricketer, and it is found in the case that the committee of the club assist the beneficiary by devoting the proceeds to the benefit of the cricketer with due discretion. It is further found that: "the income derived from the proceeds invested is paid to the beneficiary. The invested sum has, however, always eventually been handed over to the professional cricketer when his career as a cricketer is over, or when he finds an investment (such as a share in a business or farm) of which the trustees approve," and also that the whole of this sum which was realized has since been paid to him by the County Club. He has utilized the sum or some portion of it in the purchase of a farm. The whole scheme of allowing a benefit and taking care of the proceeds until a suitable investment is found is adopted by the committee in order that the full advantage may be obtained by the beneficiary in the most prudent manner of providing for him

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when his cricketing days are done, or when he wishes for any part of the year to devote himself to some business or employment which may enure to his benefit.

Upon those facts it was contended on behalf of the respondent that the net proceeds derived from the benefit match were in fact received by him from the funds of the general public and not from the funds of his employers, and that, therefore, they were not an emolument or profit appurtenant to his employment.

It appears to me that that contention if accepted, as I understand it was, by the Commissioners, carries the respondent no distance at all, because applying the test in *Herbert* v. *McQuade* (1) it does not matter whether the sum was voluntary or whether it was compulsory on the part of the persons who paid it. That finding, therefore, if accepted, does not in any way relieve the respondent from the charge to tax. Then it was contended—and this contention was also accepted—that the net proceeds were a donation or gift. But again that does not answer the question, because the donation or gift may have been received virtute officii, as in the case of the Easter offerings which have been given to the incumbents of benefices and which have been declared in the cases which have been cited to us to be taxable. It appears, therefore, that those two contentions are not sufficient to render the respondent immune from tax, and one has to come back to consider what is the substance of the matter. At the time when the benefit match was given there were some subscriptions sent in by the public. The Crown have not contended that there was a liability to assessment in respect of that portion of the benefit moneys obtained by public subscription, because, as I understand, the Crown recognize the distinction which may be found in particular cases, and hold that public subscriptions may be considered to fall outside the sum chargeable, because in respect of them there were facts pointing in one direction which made them purely personal gifts to the recipient. The distinction which is drawn between the subscriptions

(1) [1902] 2 K. B. 631.

and the proceeds of the benefit match seems neatly to illustrate the line which is to be drawn between sums which fall on one side or the other. But after recounting the facts as I have done and giving consideration to the substance of the matter and bearing in mind the regulations which I have read, it appears to me that this sum of 939*l.* cannot be considered to be an extraneous addition to Seymour's wages or a fortuitous donation, but that it was an addition arranged by and through his employers at a time when they considered that a benefit match should be allowed to him, and was an addition contemplated as a possibility in the course of his employment in the very terms which regulated the employment of their staff, including the respondent.

For these reasons it appears to me that this sum of 939*l.* falls within the principle which has been laid down in *Herbert* v. *McQuade* (1) and the other cases, and is taxable just as any other sums are taxable which are received in the course of employment and are profits arising therefrom.

For these reasons it appears to me the learned judge's judgment cannot stand and that the appeal must be allowed with costs.

WARRINGTON L.J. I am of the same opinion. In the year of assessment, 1920–21, the respondent, a professional cricketer in the service of the Kent County Cricket Club, became entitled, by virtue of the regulations between the club and its staff, and of the exercise in his favour of a certain discretion given to the club by those regulations, to have the net proceeds of the gate money of a match which was played for his benefit applied for purposes exclusively in his interest and for his benefit. As a matter of fact the money in question was actually paid to him. Speaking for myself, I think that the effect of those regulations is, according to well known principles of law, to create an absolute ownership in the man in whose favour the benefit match is played. For this reason it seems to me to fall within the principle that if a trust is declared for purposes which are exclusively for the benefit

(1) [1902] 2 K. B. 631.

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of a particular individual and there is no trust for other people in respect of moneys not so applied, that is in effect a trust for the man absolutely, and it would be impossible to impose on that absolute interest any restraint upon alienation or anything which would in any way restrict his absolute ownership thereof, the important fact, of course, being that there is no trust for any one else, either as to the whole or any portion not applied for the man's benefit under the discretion given to the club, nor is there any trust over in case the sum should by virtue of any alienation, voluntary or involuntary, become payable to any other person.

Now, the circumstances and the facts were these. The man was, as I have said, a professional cricketer in the service of the club. He was, of course, in receipt of a salary, though the amount of that salary is not found by the special case. The regulations, which are entitled "Regulations for the Staff," contain this provision: "The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiary." It seems to me plain from those regulations that when a man enters the service of the club he has the expectation that if the club think fit they will at some time or another allow him to take the net proceeds of a benefit match. In fact, this particular match took place in the year 1920–21, the year of assessment. The total gate money was 1568*l.* 3*s.*; from that was deducted 628*l.* 6*s.* 1*d.* for entertainment tax, ground and other expenses and insurance, leaving a net balance of 939*l.* 16*s.* 11*d.*, and after an interim investment of the funds, the income of which was paid to the taxpayer, ultimately in the year 1923 those investments were realized and the proceeds were paid to the respondent, the taxpayer. Now, under those circumstances, is that sum of 939*l.* 16*s.* 11*d.*, for the question is confined to that, chargeable with tax in the year of assessment? The law on this subject was laid down as I venture to think once

for all in the judgment of Lord Collins M.R. in *Herbert* v. *McQuade* (1), and there are two passages in his judgment to which I think it is desirable to refer. After stating generally the circumstances of that particular case, which it is unnecessary now to mention, Lord Collins M.R. says this: "If, as the respondent contended, it was in fact a gift personal to himself, I do not think that it would fall within Sch. E; if, on the other hand, it accrued to him by virtue of his office of incumbent, the respondent himself could hardly dispute his liability." And then later on in a famous passage (2) he states what he thinks is the proper test to apply in such cases. After referring to a judgment in the Scottish Court, he proceeds in these terms: "Now that judgment, whether or not the particular facts justified it, is certainly an affirmation of a principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income tax is not negatived wholly by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it."

Now did this money come to the respondent by virtue of his office? Looking at the regulations, I am satisfied that from that alone one must come to the conclusion that it did come to him by virtue of his office. It is something which obviously was contemplated as a possibility amongst the terms under which he was serving the Kent County Cricket Club, but more than that, it seems to me that this came to him not merely by virtue of his office, because it was something which he might expect to get from his office, but it came to him from his employers, when one comes to think of what really happened. If this match had been held without the

(1) [1902] 2 K. B. 631. 641. (2) [1902] 2 K. B. 649.

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exercise by the club of their discretion in this man's favour by making it a benefit match, the gate money would have been the property of the club and would have gone into their coffers. It is quite true that the gate money which would have been taken at the match if it had not been a benefit match may have been less in amount, but that seems to be quite immaterial. They were under no obligation to give the benefit. They were under no obligation to give him any portion of the gate money that day, and it seems to me that by making the match a benefit match, it was their act which gave him the right to receive this gate money. That seems to me to be one extremely and perhaps the most important factor of all, and it is that fact which distinguishes the gate money from the subscriptions which were gathered outside. As regards those subscriptions, the club never had any interest in them at all. They were, as it seems to me, quite properly treated by the Crown as falling on the other side of the line, and as donations purely personal given by outsiders to the man for whose benefit they were given. That seems to me to be the crucial point in this case, that this was money given to him by the will of his employers and in a manner contemplated by the actual terms of his employment as shown by the regulations.

But then it is said that one must look at it in another way, and great reliance is placed upon *Cowan* v. *Seymour*. (1) In my opinion that case was distinguished from the present by two facts; first, the employment in the present case had not terminated. The man became entitled to this money in the year 1920, and as far as appears by the case he is still in the service of the club, and he certainly was in service with the club so late as 1923, when the money was paid over. That is one point on which *Cowan* v. *Seymour* (1) is distinguishable. The other point on which it is distinguishable is that in that case the money was paid, not by the employer, but by persons other than the employer, for whose benefit it was conceived, the man in question had been acting. The facts were these: the question arose on the voluntary

(1) [1920] 1 K. B. 500, 510.

liquidation of a company. The taxpayer was appointed the liquidator in that voluntary liquidation and, as liquidator, he was acting in the name of and on behalf of the company; but when the liquidation was concluded there was a surplus of assets over liabilities, and that surplus belonged not to the company, who were his employers, but to the shareholders, and it was by a vote of the shareholders that that money was paid over to the liquidator. Lord Sterndale M.R., in giving his judgment in favour of the taxpayer in that case and finding that it was a purely voluntary testimonial or donation by the shareholders to him, lays stress on these two facts, and says: "Looking at those facts as so stated I find, as I have said, the very important factor of the office having terminated, and the other almost equally important factor that the payment was made, not by the employer but by other persons, though in this case perhaps that is not quite so important as there is a close connection between the employer, the company, and the persons who gave the money." In the present case that connection does not exist. There is no close connection between the club, who are the employers, and the public who give the money. There is no connection at all. The public are quite independent of the club.

The learned judge has rested his judgment in favour of the respondent on three circumstances—namely, the largeness of the sum; the circumstance that it is liable to this trust; and the circumstance that it is coupled with subscriptions. With all deference to the learned judge I cannot for myself see that any of those circumstances is in the least material to the question we have to determine—namely, whether this sum came to him, in the words of the Act, "from his employment." How does the largeness of the sum affect that question? It is a large sum in comparison with his salary I agree; I admit that. Although the case does not state what the amount of his salary is, it is 250*l.* But how can that have any bearing on the question whether the sum comes to him, having regard to the other facts, "from his employment"?

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The second circumstance which the learned judge refers to is that it is liable to this trust. I quite admit, if it be necessary to admit it (though I think it would be contrary to the law), that this is a trust for certain purposes which do not involve an absolute right of the respondent to receive the money. Even so, I cannot understand how the fact that it is subject to that trust makes whatever he gets out of it any the less derived from his employment. As a matter of fact, of course, he received the whole of it, and for the reasons which I have already stated I think that he was entitled to receive the whole of it.

The third circumstance is that it is coupled with subscriptions. If that has any materiality at all, it seems to me that the result of that is to distinguish this particular sum of money now in question from the amounts given by subscriptions, and to emphasize the fact that the one sum is derived from the employment and the other sum is not. With all deference to the learned judge I cannot see, speaking for myself, that any of those circumstances ought to have led him to the conclusion at which he arrived, that it was a mere donation or testimonial to this man from persons with whom he had made himself popular or who were favourable to him.

I think that the appeal must be allowed, and that the Crown is entitled to tax the taxpayer in respect of this sum of money as in the year of assessment—namely, 1920–21.

SARGANT L.J. In this case I have the misfortune to differ from the other two members of the Court and to consider that the judgment of the learned judge ought to be affirmed. My difference is not a difference as regards the law at all, but it is a difference as to the application of the particular facts of this case to what I conceive to be the settled rule of law. I accept altogether the test that was laid down by the then Master of the Rolls in the case of *Herbert* v. *McQuade* (1), that you have to consider whether the sum in question accrues to the subject in virtue of his office. But in considering that you have to take into account what was said by

(1) [1902] 2 K. B. 631.

Stirling L.J. (1) He says this: "I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part; and what we have to determine is whether the sum in question does so come to the holder of this office." We have to consider whether this comes to Mr. Seymour merely as a member of the Kent county eleven or whether it comes to him by way of a personal gift in recognition of the brilliance of his performances in the past. Rowlatt J. put it in a sentence, which has been accepted by the Crown as a correct statement of the law, in these terms: "Is it in the end"—that is, of course, after weighing all the circumstances—"a personal gift, or is it remuneration?"

The case in favour of the Crown has been rested mainly upon this, that there is a usual or settled practice of the cricket club, as shown by the statements in the case and in the extracts which have been printed of the regulations, as to benefits given to the staff—a settled practice to show that there is some claim or title on the part of the cricketer to expect and receive a donation of this kind. But in my judgment these regulations merely show that a benefit is given on occasions sufficiently numerous, when the whole number of cricketers who receive them is considered, to render it advisable that there should be some ordinary or usual practice of the club with regard to them. It would be a pity if, on each individual occasion, the club had to consider and to formulate the conditions on which a gift should be made. I do not think that those regulations show or indicate whether the proceeds of the benefit are in fact received or accrue to the recipient as part of his emolument or as a mere personal gift, and the regulations do make this at any rate perfectly clear, that whether a particular cricketer shall receive a benefit or not is absolutely and entirely in the discretion of the club, and does not in any way follow necessarily from the fact that he has played in the county eleven. It seems to me that those indications on which the

(1) [1902] 2 K. B. 631, 650.

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Crown has relied is certainly not conclusive to show that the moneys derived from the benefit match are by way of extra remuneration and are not by way of a personal gift to the recipient.

Now let me deal with what appear to be the indications that the money is a personal gift. In the first place it is one exceptional sum. I do not think it was suggested that a cricketer has ever received two benefits. It is one quite exceptional sum, quite disproportionate to any ordinary remuneration, and apparently, if not actually, on the termination of the service, at any rate in expectation of that determination. I think that appears from a paragraph of the case, where it is said: "The invested sum has however always eventually been handed over to the professional cricketer when his career as a cricketer is over, or when he finds an investment." In this case it was not actually on the termination of the cricketer's career, fortunately, but it was no doubt in view of the services that he had long rendered to the club and the expected termination of them at no very distant date. This seems to me to be a circumstance which points very strongly to the money being by way of personal recognition, a testimonial, and not remuneration. Very great stress was laid upon such a circumstance by Lord Sterndale M.R. in *Cowan* v. *Seymour* (1), where he referred to a passage in *Duncan's Trustees* v. *Inland Revenue Commissioners* (2), in which Lord Dunedin had said: "I confess I have never been able to see how it could possibly be said to be in respect of his office, when the whole reason it was given to him was that he was no longer in the office." The learned Master of the Rolls developed that in a passage which is too long to quote, and then he summed it up in this way: "In the present case I should certainly say that on the undisputed facts of the case the payment was not a payment for service rendered in the true sense, nor a profit which accrued to the appellant by reason of his office, but was very much more in the nature of a testimonial to him for what he had done in the past while his office, which had then terminated, was

(1) [1920] 1 K. B. 500, 509, 510. (2) 1909 S. C. 1212, 1215.

in existence." So that this circumstance that the payment is made, if not absolutely on the termination of the office, in expectation of such a termination, is a very strong indication that the gift is a personal one and does not accrue to the recipient by virtue of his office.

Then there is the second point, the amalgamation of the subscriptions with the net receipts from the benefit match. The subscriptions, of course, are clearly personal gifts. The Crown has not ventured—however wide the net has been thrown, and however small the mesh of which the net now appears to consist—to say that the subscriptions, which were given of course by personal admirers of the cricketer in recognition of brilliant play in the past, were something given to him merely because of his being a member of the eleven; and in the same way, it does seem to me that the same remark applies to the payments that were made by the general public when they flocked to the match in larger numbers because they desired to express their recognition of the claims of the individual. It is clear to my mind that the club were as much bound towards the public to hand over to the recipient the net proceeds from the particular benefit match, or to hold them for his benefit, as they were bound to hold for his benefit the actual subscriptions made by the particular admirers of the cricketer. In each case there was a definite obligation on the club to hold for the benefit of the cricketer sums which had been provided by the public, partly by means of subscriptions and partly by means of their flocking to his benefit match, and so increasing the net receipts to be handed over.

Then comes a third circumstance, that under the regulations the money was not to be handed over to him directly, but was to be used for his personal benefit. Now I do not in the least dissent from what has been said by Warrington L.J. as to the effect in law of the impressing of a trust in favour of any individual. It may be, I think it probably is, the case that, although the regulations provided that discretion of this sort was entrusted to the committee, yet nevertheless Seymour, being the only beneficiary under the trust, could

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have demanded to have the moneys paid to him at once. It may very well be so, but that seems to me to have no bearing at all upon the question as to the object with which the moneys were subscribed or arose from the match. The fact that this trust, even if ineffectual, purported to be declared is a clear indication that the object of the donors was to secure for the cricketer personally, and by way of personal advantage, the sums which were going to be used by the committee of the club under those regulations. It is not because the trusts are effective that I attach importance to them, but because they indicate that what is desired is the personal benefit of this particular individual.

From all the circumstances of the case—and I have referred to the main circumstances (though I have not put them in the same language) which mainly influenced the learned judge—the Commissioners drew a conclusion of fact, and I think that conclusion of fact was this: If one looks at the case one sees they drew the conclusion of fact "that the net proceeds of 939*l.* 16*s.* awarded to him as above mentioned were a donation or gift and not assessable to income tax"—and I think that by that they must have meant that it came to him by way of a personal present and not merely by virtue of his office; and the learned judge has drawn the same conclusion, and I draw it also. It appears to me that the main, the substantial reason why these moneys were to be paid to Seymour was, not because he had been a mere member of the eleven and as part of an addition to what was given to him by virtue of his office, but as a personal present by way of recognition of the pleasure that had been afforded to the patrons of the club and the general public who had flocked to see the play, by the brilliance of the particular individual cricketer's play.

I should like to say this—which compares small things with great—that really this is very much like the cases where large sums have been voted to successful generals on the conclusion of a great war. In such cases those sums could never have come to them at all, of course, unless they had been in the army and had been employed as generals. But

that is not conclusive. The vote is made to them by way of a personal present—individual recognition of the separate individual services which those particular persons have rendered; and in my view it would be wrong to say that such sums were sums coming by virtue of the office and were not sums by way of personal individual gift, recognition of special personal qualities, or testimonials to the individual. In such cases the personal equation is the decisive matter, and not the mere fact that the individual holds a particular office.

I want to say just a few words about the authorities, because it seems to me that here the Crown are really claiming something quite beyond anything that has ever been claimed by them in any decided case. Take those four cited to us, where the Crown was successful: *Inland Revenue* v. *Strang* (1); *Herbert* v. *McQuade* (2); *Poynting* v. *Faulkner* (3); and *Blakiston* v. *Cooper*. (4)

All those were cases of systematic and recurrent augmentation of the remuneration of ministers of religion, by Christmas gifts, Easter offerings or augmentation funds. They were recurrent; they were made at times when the sums paid could be and no doubt were used by way of extra maintenance for those ministers of religion in addition to their regular salaries; and they were all cases in which it was found, after an examination of the facts, that the object was to benefit the office and not to benefit the particular individual. The sums were awarded to them, not after an inquiry into their particular personal need or otherwise; they were awarded to them quite irrespective of that, and that was considered a very important element in the determination of the case. But in *Turton* v. *Cooper* (5) (which immediately preceded *Poynting* v. *Faulkner* (3) and was in no way dissented from in it), a gift to the curate of 50*l*. because he had done certain special work and because he was in very low water—I think

(1) 15 S. L. R. 704; 1 Tax Cas. 207.
(2) [1902] 2 K. B. 631.
(3) 93 L. T. 367.
(4) [1907] 2 K. B. 688; [1909] A. C. 104.
(5) 92 L. T. 863; 5 Tax Cas. 138.

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the personal poverty was the main element in determining the gift in that case—was held not to be taxable. Therefore it appears to me that when you once get to a case where the personal element is the main reason of the gift, and the holding of the office is merely an occasion on which the gift can be made, in such cases it has been recognized that the liability to tax depends upon the circumstance that the gift was made, not to the individual as a personal present, but to the holder of the office.

Again in *Blakiston* v. *Cooper* (1), where on all the facts the recipient was held taxable, Lord Loreburn points out quite clearly in his speech in the House of Lords that a gift of an exceptional kind, such as a personal testimonial, is necessarily exempt from the general rule. In *Blakiston* v. *Cooper* (1) there was, as I have said, a recurrent augmentation, and therefore it was held that the sum in question was liable to income tax, but Lord Loreburn pointed out quite clearly that the decision did not apply to a case of an exceptional gift by way of testimonial or personal recognition.

Then, to mention again *Cowan* v. *Seymour* (2), to which I have already referred quite shortly, there is a very distinct recognition of the non-liability to tax where the gift is, as there, a gift at the termination of an office and in respect of some definite personal suitability or personal services of the recipient, apart from the mere holding by him of the office. It seems to me here that, although it is quite true that in this case the opportunity of making this gift to Seymour would not have arisen had he not been in the employment of the Kent County Cricket Club, yet the real reason why this gift was made to him was because of his personal position as a brilliant cricketer who was coming towards the termination of his career, and to whom it was thought suitable that some personal gift or testimonial should be rendered to the extent to which his personal admirers thought fit to render it. In my judgment this is a case where the gift was not, as regards

(1) [1909] A. C. 104. (2) [1920] 1 K. B. 500.

its main and substantial reason, a gift to him in virtue of his office, but a gift to him in respect of his special personal qualifications and by way of individual gift.

In my opinion, therefore, the appeal should be dismissed, but of course that view has no effect.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Halsey, Lightly & Hemsley.*

R. M.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

SIR M. ARCHER SHEE *v.* F. G. BAKER (INSPECTOR OF TAXES).

Revenue—Income Tax—Foreign Securities—Foreign Possessions—Trust Fund—Dividends not remitted to United Kingdom—Foreign Trustees—Balance of Income paid to British Beneficiary—Liability of Beneficiary to Income Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases IV. and V., General Rules, No.* 16.

A testator, a citizen of the United States, left the residue of his property in trust for his daughter during her life. The trustees, who had full power over the investing of the trust fund, were a company constituted under American law and resident in the State of New York. The trust fund consisted of foreign Government securities, foreign stocks and shares, and other foreign property. The trustees paid over such part of the sums they received from the fund as they considered to be income, after deducting expenses, to the order of the daughter at a bank in New York. The appellant, who was the husband of the testator's daughter and resident in the United Kingdom, was assessed under Case IV. of Sch. D in the full amount of the income of the specific stocks and shares constituting the trust fund:—

Held, by Rowlatt J., that for the purpose of the Income Tax Act, 1918, the appellant's wife must be considered as receiving the income from the specific securities, stocks and shares which constituted the trust fund, and therefore the appellant was chargeable with income tax under Sch. D, Case V., r. 1, in the full amount of the income of the trust fund.

Held, by the Court of Appeal, that upon the facts found by the Commissioners, the wife could not require the trustees of her father's will to send over to her the dividends on the specific securities, stocks

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or shares constituting the trust fund, in the form received by them, and she was not entitled to more than the balance thereof after deduction of outgoings, which balance when received by her had lost all trace of its origin and rightly fell to be taxed under Sch. D, Case V., r. 2, as income arising from possessions out of the United Kingdom other than stocks, shares and rents.

Decision of Rowlatt J. reversed.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Special Commissioners held on January 30, 1925, Sir Martin Archer Shee (hereinafter called "the appellant") appealed against two assessments made upon him under Sch. D by the Additional Commissioners of Income Tax in estimated amounts of 12,000*l.* each for the two years ended April 5, 1925, in respect of profits from foreign and colonial securities under Case IV.

Alfred Pell, a citizen of the United States of America, who died in that country, by his will directed that all the residue of his real and personal estate should be held in trust by his executors and trustees (inter alia), that in the event of his wife dying leaving no issue by him surviving, the whole of the income and profits thereof should thereafter be applied to the use of his daughter, Frances, during her life. Such application to the use of his daughter might be made by paying over the said income and profits as the same should accrue to her personally or on her order or receipt and free from the debts or control of any husband she might have, but without power to assign, pledge, or encumber the growing income or profits.

He nominated and appointed his wife and J. P. Morgan, jun., of the city of New York, to be the executors of his will and trustees of all trusts therein created. He gave them full power and authority to sell all his real estate, and also full power and authority in their discretion to retain and hold any investments he might have at his death, or to change such investments and to invest the moneys of his estate in any stocks, bonds, or other securities, Government, municipal, corporate or private, as they might deem expedient. In case the said J. P. Morgan, jun., should decline to act as

executor of or trustee under the will, or should die, resign, or become incapacitated, he authorized his wife, or in case of her death then his said daughter, Frances Pell, to nominate and appoint some trust company, organized under the laws of the State of New York, as executor and trustee in his place, and the trust company so nominated should become one of the executors and trustees under his will duly authorized to perform all the duties of an executor and trustee thereunder, with like power and authority and discretion in all respects as if appointed by the testator in his will.

The widow of Alfred Pell died in 1904, leaving the said Frances Pell, but no issue by the said Alfred Pell, her surviving.

In 1914 the said J. P. Morgan, jun., resigned the trusteeship, and the Trust Co. of New York, being a company constituted under American law and resident in the State of New York, was appointed to be executor and trustee of the will. The trust fund constituted under the will consisted of foreign Government securities, foreign stocks and shares, and other foreign property.

During the three years ended April 5, 1925, the appellant was married to the said Frances Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use. The Trust Co. of New York had paid over such part of the sums which they received from the fund as they considered to be income as the same accrued to her order at Messrs. J. P. Morgan & Co.'s bank in New York, while retaining in their own possession such sums as they thought might be required to comply with the income tax or other provisions of American law.

It was contended on behalf of the appellant (1.) that the right which the appellant's wife had under the will was a right, which belonged to her by virtue of and subject to the provisions of the laws of the State of New York, to have the trusts of the will duly administered, and was a foreign possession and not a foreign security; (2.) that the mere fact that the trustees in exercise of the power conferred by the will on them applied the income and profits by paying over such portion as they regarded as income to the order of

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the appellant's wife in America did not alter the character of the foreign possession for the purpose of the Income Tax Acts; (3.) that so much only of the income receivable by his wife from the Trust Co. of New York under the will as was actually remitted to her in the United Kingdom was chargeable upon him with income tax under the rules of Case V., Sch. D (1); (4.) that under General Rule 16 of the Income Tax Act, 1918, the appellant was only assessable in respect of the profits of his wife, and that the specific dividends and interest from the specific stocks, shares, securities, and other property referred to were not profits of the wife within the meaning of the rule, nor assessable as her profits if she had been sole and unmarried.

It was contended on behalf of the respondent, the inspector of taxes, that the income receivable under the will by the wife of the appellant from the Trust Co. of New York arose from the specific securities, stocks, shares, rents, or other property which constituted the trust fund, and must be

(1) Income Tax Act, 1918, Sch. D, Case IV., r. 1: "The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not. . . . ."

Case V.: "Tax in respect of income arising from possessions out of the United Kingdom."

Rules applicable to Case V.

1. "The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years . . . . whether the income has been or will be received in the United Kingdom or not. . . . ."

2. "The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom . . . . on an average of the three preceding years. . . . ."

General Rules applicable to all Schedules.

16. A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried:

Provided that—

(1.) The profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee."

charged upon the appellant accordingly under the Rules of Cases IV. and V. of Sch. D in the full amount thereof, whether the income was actually remitted to the United Kingdom or not.

The Special Commissioners decided that the contentions of the respondent were right, and determined the appeal accordingly.

Maugham K.C. and *Edwardes Jones K.C.* for the appellant. The appellant's wife is not entitled to the specific stocks and shares constituting the trust fund, she only has an interest in the trust fund in that she is entitled to the net income arising from the fund after the expenses of the trustees, which may be very heavy, have been deducted. Previous to the passing of the Finance Act, 1914, the duty to be charged in respect of foreign possessions was computed on the actual sums annually received in the United Kingdom. The Act of 1914 divided foreign possessions into two classes: (1.) stocks, shares or rents out of the United Kingdom, the tax on the income arising therefrom being computed on the full amount thereof whether received in the United Kingdom or not, and (2.) possessions out of the United Kingdom, other than stocks, shares or rents, the tax on the income arising therefrom being computed on the actual sums annually received in the United Kingdom. This was done to prevent the liability to the tax being avoided: see per Lord Cave in *Singer* v. *Williams*. (1)

In order to make Case V. of Sch. D apply the person to be assessed must have such an interest in the property as to entitle him to the profits or gains in question: *Drummond* v. *Collins*. (2)

The appellant's wife could not say to the trustees of the fund that the income of any particular stock forming part of the trust fund was hers. Her only right was a chose in action against the trustees to administer the trust for her benefit. That was a foreign possession other than stocks, shares and rents, and therefore the appellant is only liable

(1) [1921] 1 A. C. 41, 47. (2) [1915] A. C. 1011, 1018.

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under Sch. D, Case V., in respect of the income actually received in the United Kingdom.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the respondent. The appellant's wife receives income arising from foreign stocks, shares or rents, and therefore she must pay income tax on the full amount thereof under r. 1 applicable to Case V. of Sch. D. Where there is a trust fund composed of foreign stocks and shares some one must receive the interest and dividends arising therefrom. In the case of a trust there are only two persons who can receive them—namely, the trustee or the cestui que trust. If the trustees were resident in this country and the beneficiary resident abroad the trustees would not be chargeable with income tax in respect of dividends not remitted to this country: see *Williams* v. *Singer*. (1) The House of Lords there negatived the contention that the revenue authorities were not entitled to look beyond the legal ownership of the fund, and laid down the proposition that the person to be charged with the tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. If the beneficiary receives the profits he is liable to be assessed upon them. That directly applies to the present case. It is necessary to look at the real beneficial owner. Here the income of the trust fund belongs to the appellant's wife and not to the trustees. The trustees send her as much of the income as she requires, and therefore she is liable to income tax on the full amount of the income of the fund and not merely on the amount received in the United Kingdom. The appellant's wife is entitled under the will of her father to the whole of the income of the securities forming the trust fund for her life. The fact that certain expenses are deducted from the income does not make any difference. The appellant's wife could not say that she did not receive the dividends from the securities forming the fund because she did not know from which securities the expenses ought to be deducted. The interposition of trustees does not make the cestui que trust any the less the recipient of

(1) [1921] 1 A. C. 65.

the income from the stocks and shares in which the trust fund is invested. In *Drummond* v. *Collins* (1) the trustees had the right to accumulate the whole of the income of the trust fund, with a power in their discretion to make an allowance to the infant, which power they exercised. The House of Lords negatived the contention that the allowance was a free gift to the infant and not liable to income tax, and held that if the trustees chose to exercise their discretion and make an allowance to the infant it became the income of the infant.

Maugham K.C. in reply. The specific dividends of the stocks and shares forming the trust fund are the property of the trustees and not of the beneficiary: *Lord Sudeley* v. *Attorney-General* (2); *Barnardo's Homes* v. *Special Income Tax Commissioners* (3); and *Herbert* v. *Income Tax Commissioners.* (4) There is no doubt but that the beneficiary is liable to income tax, but the question is whether she is taxable on the basis that her income is derived from one source, in which case she would be liable to income tax on the full amount, or from another source, in which case she would only be liable to income tax on the amount received in the United Kingdom. She only has the right to bring an action against the trustees for the administration of the trust, but she has no right to claim the specific dividends. The trustees render an account in which they include in one sum all the income of the trust fund less expenses.

Sir Douglas Hogg A.-G. replied on the cases.

ROWLATT J. A taxpayer is taxed under Case V. of Sch. D of the Income Tax Act, 1918, on the income arising from foreign possessions. I do not lay any stress upon the words "arising from," because "arising from" is obviously used as being the same thing as "from." Under the legislation which was introduced in 1914—namely, by the Finance Act, 1914, s. 5—incomes from foreign possessions have been divided into two categories; that is to say, income from

(1) [1915] A. C. 1011.
(2) [1897] A. C. 11.
(3) [1921] 2 A. C. 1.
(4) (1925) 9 Tax Cas. 593.

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stocks, shares and rents, and income from foreign possessions other than stocks, shares and rents. Therefore it is quite obvious that when one speaks of income from stocks, shares or rents out of the United Kingdom, what is meant is income from foreign possessions being stocks, shares or rents; and the question in this case is whether or not this lady's foreign possessions were within the meaning of the Income Tax Act, 1918, Sch. D, Case V., stocks, shares and rents.

The appellant's wife is not entitled specifically to the income from the stocks, shares and rents constituting the trust fund; she is merely entitled to the income from the trust fund. She is, of course, not the shareholder or the stockholder or the landlord, as the case may be, and the trustees are not her nominees for that purpose; they exercise their discretion in the matter of investments, although they exercise their discretion for her benefit.

Mr. Maugham says that she has no interest specifically in the stocks, shares and rents constituting the trust fund, and that they are not her possessions. The question is whether that is an argument which carries him home in this case. Of the correctness of the proposition generally speaking there can be no doubt at all. What this lady enjoys is not the stocks, shares and rents or other property constituting the trust fund under the will; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees, to administer this property during her life so as to give her the income arising therefrom according to the provisions of the trust. Her interest is merely an equitable one, and it is not an interest in the specific stocks and shares constituting the trust fund at all. There is no doubt about the correctness of that proposition. But the question is whether that is so for the purpose of income tax.

The view put forward on behalf of the Crown is that the appellant's wife receives the income from the stocks and shares constituting the trust fund, because for the purpose of the Income Tax Act, 1918, Sch. D, Case V., the possessions need not be her possessions in a legal or specific sense; it is sufficient

if she in fact receives the income from the stocks and shares constituting the trust fund.

It seems to me that I must adopt the latter view. Without in the least impugning Mr. Maugham's description of the position of the appellant's wife from a legal point of view, for the purposes of the classifications in the Income Tax Act, 1918, I must adopt the view that she has income from the stocks and shares constituting the trust fund. I do not think I can possibly hold otherwise, having regard to the decision of the House of Lords in *Williams* v. *Singer*. (1) It is true that what was there held was that the trustees could not be assessed. Why could they not be assessed? It was pointed out that trustees domiciled and resident in the United Kingdom for a person domiciled and resident abroad can only be assessed wherever the cestui que trust is liable. Why was the Princesse de Polignac in that case not liable? Because she was resident abroad and was not deriving income from property within the United Kingdom. What was she deriving income from? From these foreign investments. That is the way the position must have been looked at. It was not suggested there, and I do not think it could be suggested, that she might be treated as drawing an income from property in the United Kingdom represented by her interests under the trust so that the Crown could disregard the form of investment and charge her upon special property of that kind. She was held not chargeable, therefore, because, being resident abroad, her interest was from a foreign source, and that being her position her trustees, who were resident in the United Kingdom, could not be assessed. If the Princesse de Polignac had been resident in England and not abroad she would clearly have been liable to be assessed. On what would she have been assessed? She would have been assessed on the foreign stocks and shares constituting the trust fund, upon which it was held the trustees could not be assessed. That is what she would have been assessed upon; there was nothing else that she could have been assessed upon. That is the position of this lady, except that her

(1) [1921] 1 A. C. 65.

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trustees are not resident in England but in America. In my opinion that fact does not make any difference at all. Trustees, it seems to me, drop out for the purpose of discussing the liability. If the trustees had been resident in the United Kingdom they would have been assessed, but as they are resident in America she is assessed. I do not think there is any difference between the two cases at all, and I think that would have been the view of the House of Lords with regard to the position of Princesse de Polignac had she been resident in England.

Although there are inconveniences which may follow from the decision, as Mr. Maugham pointed out, and which will occur to any one with imagination, as, for example, where there are two persons, say two sisters, interested in a life estate consisting of foreign possessions and foreign stocks and shares, and receiving the income therefrom, one of whom is resident in the United Kingdom and one not, the question may arise which is receiving the interest from the securities and which is receiving the interest from the possessions, because different considerations apply to the two cases. I must, however, not be frightened by a trifle of that kind—because compared with other things it is quite a trifle—in a case like the present where the difficulty does not arise. I think I am bound by the authorities to give the decision which I have endeavoured to express. My opinion therefore is that this appeal must be dismissed with costs.

Appeal dismissed.

R. F. S.

The appellant appealed. The appeal was heard on May 19 and 20, 1926.

Maugham K.C. and *Edwardes Jones K.C.* for the appellant.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the respondent.

[Counsel in effect repeated the arguments put forward by them respectively in the Court below.]

LORD HANWORTH M.R. It is important to remember in these cases that we have no jurisdiction on matters of fact;

that the duty of this Court is to see whether or not the law has been properly applied to the facts which it is for the Commissioners to find.

The facts in this case as found by the Commissioners are these. Some few years ago the appellant married a lady who was at the time an American national, and under the will of her father, Alfred Pell, also an American national, she is entitled to receive an income from the property which passed under his will. The testator provided that in the event of his wife dying leaving no issue by him her surviving the whole of the income and profits of the residue of his real and personal estate should thereafter be applied to the use of his daughter, Frances, during her life. In consequence of that provision of her father's will the wife of the present appellant is in receipt of a sum which is remitted to her from America. The will provided that some trust company organized under the laws of the State of New York should be nominated and appointed as trustee in the place of those whom he had primarily nominated under his will, and in accordance with that provision the Trust Co. of New York have been appointed the trustees to carry out the terms of the will.

A paragraph in the case states the relevant and necessary facts for our consideration, as follows: "During the three years ended 5th April, 1925, the appellant was married to the said daughter (Frances) of Alfred Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use. The Trust Co. of New York have paid over such part of the sums which they received from the said fund as they considered to be income as the same accrued to her order at Messrs. J. P. Morgan & Co.'s Bank in New York, while retaining in their own possession such sums as they thought might be required to comply with the income tax or other provisions of American law."

It appears clear from that paragraph, slightly expanded, that the Trust Co. of New York, acting properly in the execution of the trust imposed upon them, receive the income from whatever the property is which produces income and as trustees, and in the execution of their duty as trustees,

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they comply with the law in America and pay such sum as may be necessary as an income tax or other tax imposed by the laws to which the trust is subject, and they retain in their possession such sum, I suppose, as may be necessary to defray their costs charges and expenses, and having done so, they remit to this country the balance.

It appears from that statement of fact that what they remit is not what I will call the dividends in specie in their actual form; what they remit is the balance in their hands after they have carried out their trust and defrayed the expenses which fall upon the trust. They do not remit the whole of the income from the profits, but they remit a sum which has lost its origin or parentage; it has lost the shape of dividends, share warrants, or the like, and is merely a sum of money which represents the balance after payment of the sums which would properly fall upon the trust.

If the trustees did not fulfil their duty in that way, proceedings could no doubt be initiated in the Courts of the State of New York in order to set the matter right; but we have, upon the facts stated to us, to take the case of a remission of a sum of money being the balance in the hands of the trustees arrived at after deduction of appropriate charges which fall upon the trust.

It appears to me clear, assuming as I do that the trustees do their duty, that this lady could not require the trustees to send over the dividends in the form in which they originally received them; that she is not entitled to more than such sum as is remitted to her which represents a balance in the hands of the trustees; and more than that, that if questions arise in respect of the receipts which fall into the hands of the trustees, whether those sums so received represent capital or income, it is for the trustees to determine whether they are to be appropriated to capital or to an income account.

It is perhaps not unimportant to observe what was said in *Lord Sudeley* v. *Attorney-General.* (1) There the testator gave to his wife one-fourth of his residuary real and personal

(1) [1897] A. C. 11, 15.

estate. Part of the estate consisted of mortgages on real property in New Zealand, and an attempt was made to say that she was directly interested in those mortgages. It was pointed out by Lord Halsbury that it was the fallacious use of language as applicable to the rights of these parties which led to the difficulty, and that what she was interested in was one-fourth of the residuary estate. He says: "It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist." There are other passages in the other speeches, but Lord Davey puts it very shortly (1) thus: "I am of opinion, on the facts of this case, that Mrs. Tollemache at the time of her death had no right of property in or right to claim any part of the mortgages in specie, and that the appellants, her executors, acquired only a right to have the estate duly administered and to enforce that right by an action for the purpose, but had no right virtute officii to have any part of the New Zealand mortgages appropriated to the estate of their testatrix in specie."

Applying the analogy of that case, it appears to me that from the facts which are found here, this lady could not require the dividends or other receipts to be sent over to her in specie, and that, until the trustees have ascertained what is the balance which they are able to appropriate to the income account, she is not entitled to that sum, and it is only to the sum when so ascertained that she has a right.

Now the question is, how is that sum so paid over to her to be taxed? Of course her husband has to make a return in respect of the income of his wife; no question is raised upon that. The tax under Sch. D shall be charged "In respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere." Those words are wide enough to cover this sum so paid over to the wife of the appellant.

(1) [1897] A. C. 21.

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Under the Cases there are certain categories under which this tax under Sch. D is to be ascertained and paid. Case IV. is this: "Tax in respect of income arising from securities out of the United Kingdom except such income as is charged under Sch. C." Case V. is: "Tax in respect of income arising from possessions out of the United Kingdom."

Under which of those Cases does this sum remitted and received over here fall? When one turns to the more specific rules one finds that Case IV., r. 1, says: "The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment." But is this sum income arising from securities? In *Singer* v. *Williams* (1) it was decided that shares in a foreign trading company are foreign possessions and are not foreign securities within Case IV. of that Schedule, and the present Lord Chancellor gave an indication or definition of what is the meaning of the word "securities." This lump sum of money, this balance, does not appear rightly to fall within the words of Case IV., r. 1, as income arising from "securities." Exactly what those securities are it is unnecessary at present to define or to determine, but from what I have already said it is plain that this balance has lost its original character as being dividends from debentures or shares or the like, and it appears to me that it does not fall within Case IV., r. 1, as income arising from securities.

Then we have to consider Case V. Case V. contains two rules. The first rule is: "The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years." From what I have already said it is plain that this is not income arising from stocks, shares or rents. Is it therefore immune from taxation? Not so. There is a second rule to Case V. which is as follows: "The tax in respect of income arising from possessions out of the United Kingdom other than stocks, shares or rents, shall be computed on the full amount

(1) [1921] 1 A. C. 41.

of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom."

Now having eliminated the possibility of it being taxed as income arising from securities and also the possibility of it being taxed as income arising from stocks, shares or rents, there is the possibility of it being taxed as being income arising from possessions out of the United Kingdom. "Possessions" is one of the widest words that are to be found in the Income Tax Acts. In *Colquhoun* v. *Brooks* (1) Lord Macnaghten said that the word "possessions" is to be taken in the widest sense possible as denoting everything that a person has as a source of income.

It is not suggested by the appellant that this balance remitted to and received in the United Kingdom is to escape taxation altogether, but it is said that it falls within the last rule which I have read, the second rule of Case V., and not within the others, and I agree with that contention.

I have already dealt with the difficulty of applying Case IV., r. 1, to it, because it is not income arising from securities, and also the difficulty of applying Case V., r. 1, to it, because it is not income arising from stocks, shares or rents; yet the very elimination of its chargeability under those rules appears appropriately to bring it within Case V., r. 2, as being income arising from "possessions," using that word in the wide sense attributed to it in the House of Lords, and the tax is to be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom. Those words seem apt to catch this sum which has reached this country as the balance payable to the appellant's wife.

Mr. Hills has presented us with an argument to controvert any mischievous theory arising on certain of these questions of income of beneficiaries in the possession of trustees. He is quite right in saying that in considering sums which are placed in the hands of trustees for the purpose of paying income to beneficiaries, for the purposes of the Income Tax Acts, you may eliminate the trustees. The income is the

(1) (1889) 14 App. Cas. 493.

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income of the beneficiaries; the income does not belong to the trustees. All that is quite true; but one comes back to consider what are the facts upon which this case comes before this Court, and it is to my mind essential that this Court should adhere to its proper jurisdiction, treat the facts as found, and apply the law to those facts, and what has been found—I repeat it for the sake of emphasis—is that the balance, no longer clothed in the form in which it was originally received, having no trace of its ancestry, but in the form of a balance after other payments have been made, is remitted to this country by remittances payable in the United Kingdom, and does arise from what is within the expression "possessions."

That being so it appears to me that upon the facts in this case it rightly falls to be taxed under Case V., r. 2, and not otherwise.

This case does not in any way vary or alter the many authorities that have been cited to us. It applies the principles which are contained in a number of decisions to the particular facts of this case. It does not contravene the propositions which Mr. Hills has laid down, but it says that, upon the facts, this is a case of income arising from possessions and not falling within the other Cases or rules.

It appears to me for these reasons that the appeal must be allowed and that the case must go back to the Commissioners for the purpose of having the tax assessed in accordance with Case V., r. 2.

WARRINGTON L.J. I am of the same opinion. The appellant's wife, under the will of her father, is entitled to have applied to her use—I am following the words of the will—the income and funds now constituting the residue of the real and personal estate of the testator.

By the case stated by the Commissioners it appears that the fund now consists of foreign Government securities, foreign stocks and shares, and other foreign property. No question is raised in reference to the liability of the appellant to be taxed under Sch. D in respect of the profits or gains

arising or accruing to his wife in respect of this income as being profits or gains arising or accruing to a person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere.

The question is under which of several Cases, and if under Case V., under which rule of Case V., the appellant is to be assessed and the tax is to be computed. As is well known, the Income Tax Act provides that the tax under Sch. D shall be charged under certain Cases; there are enumerated six Cases, and Cases IV. and V. are relevant to the present case. Case IV. is "Tax in respect of income arising from securities out of the United Kingdom except such income as is charged under Sch. C," and Case V. is "Tax in respect of income arising from possessions out of the United Kingdom."

The question then is, on the facts as stated by the Commissioners, under which of these Cases does the income fall to be charged, and if under Case V., then under which of two rules of Case V., because it makes a material difference to the rights of the taxpayer under which of those rules the assessment ought to be made.

Now I desire to say that the decision I am about to give depends on the facts as found by the Commissioners in this case, and that it is quite possible that the decision will be no authority in any other case, but we are bound by the facts as found by the Commissioners, and it is on those facts that I propose to express my opinion.

I have already summarized the Commissioners' statements with regard to the interest of the appellant's wife under the testator's will and the nature of the funds in respect of which she is entitled to that interest. The Commissioners then state this: "During the three years ended 5th April, 1925, the appellant was married to the said daughter (Frances) of Alfred Pell"—that is his present wife—"who was entitled to have the whole of the income and profits from the said fund applied to her use. The Trust Co. of New York"—who were the trustees—"have paid over such part of the sums which they received from the said fund as they

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considered to be income, as the same accrued, to her order at Messrs. J. P. Morgan & Co.'s Bank in New York while retaining in their own possession such sums as they thought might be required to comply with the income tax or other provisions of American law."

They therefore found that the income arising or accruing to this lady in the present case is not the actual income derived from the various sources of investment, but that it is such sum as the trustees from time to time considered to be the income, while retaining in their hands the sums which are referred to in the finding of the Commissioners.

It is contended for the Crown, and the assessment appealed from is based on the contention, that the income arising and accruing to this lady was income arising from securities out of the United Kingdom, and therefore falls to be charged under Case IV.

I am of opinion that that contention is inconsistent with the findings of the Commissioners, that the income which has arisen or accrued to this lady is not the income of so much of the fund as was represented by securities. It has been suggested that the right of the lady to have the income of the entire fund applied to her use may be a security within the meaning of Case IV., but in my opinion that contention is at all events unsustainable, and if it is to come under Case IV. at all, it can only be by treating the income arising or accruing to her as the income derived from that part of the fund which constitutes securities in the ordinary sense, as, for example, debentures or securities of that kind in railway companies.

But then it is further said on behalf of the Crown that if that is wrong and the appellant is not to be assessed under Case IV., he might be properly assessed under r. 1 of Case V. Case V. itself is expressed in these terms : " Tax in respect of income arising from possessions out of the United Kingdom." That by the rules is divided into two categories. The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom falls to be assessed and computed under r. 1, and it is contended again for the Crown, as in the case of the securities, that the income coming to this

lady is to be treated as income arising from stocks, shares or rents out of the United Kingdom. But there again I think the same answer is to be made, that the Commissioners have stated that argument out of court, because they have found that the income which has been coming to her is not the income derived from or arising from the stocks, shares or other property which is the security which makes up the entire fund.

Then, lastly, r. 2 provides that the tax in respect of income arising from possessions out of the United Kingdom other than stocks, shares or rents shall be computed in the manner thereby laid down, and is limited to the sums annually received in the United Kingdom from remittances payable in the United Kingdom; and if it comes under that rule, then the appellant is in a more favourable position than if it comes under the others.

Now from what I have said upon the facts as found, I think that the facts in the present case do not bring it within either Case IV. or r. 1 of Case V., but do bring it under Case V. as income arising from a foreign possession, and that it falls to be charged under r. 2, which applies to income from such possessions other than stocks, shares and rents referred to in r. 1.

The result is, in my opinion, that the appeal must be allowed, the assessment under Case IV. set aside, and the case remitted to the Commissioners to be dealt with properly.

SARGANT L.J. I am of the same opinion. I want to make it clear that no importance is to be attached to the fact that the trust fund in this case was originally formed or was derived from a residue, because having regard to the date at which the testator must have died, we must assume that the estate has been quite fully administered long ago, so that here we have a definite and specific trust fund.

It is to be noticed that the trust fund is one which is not held for the sole behoof of the wife of the appellant, but that she is only one of the persons interested in the trust fund, and that her interest during her life is to receive the net income after certain deductions.

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Now the facts found in the case stated by the Commissioners appear to make it quite clear that the lady was not entitled to the specific income of any item of the trust property at all. She was entitled only to such a sum as the trustees might think represented income after they had made certain deductions for income tax and other purposes, amongst which of course there must have been remuneration to the trustees themselves, either under the general law of the State of New York or under the particular constitution of the Trust Co. The learned judge has summed up the position, in my judgment, perfectly accurately in a passage of his judgment which I will now read. He says this: "What this lady enjoys is not the stocks, shares and rents or other property constituting the trust fund under the will; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees to administer this property during her life so as to give her the income arising therefrom according to the provisions of the trust. Her interest is merely an equitable one, and it is not an interest in the specific stocks and shares constituting the trust fund at all."

It seems to me that in that state of things the general reasoning of the judges and of the members of the House of Lords in *Lord Sudeley* v. *Attorney-General* (1) is precisely applicable. The question there was one of probate duty. Lord Herschell says: "It seems to me impossible to say that at the time of the death of the testatrix her executors were in a position to insist that a certain portion of these mortgages, or an interest in an undivided fourth part of these mortgages, was a part of the estate of the testatrix. In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth in what should prove to be the residuary estate of the testator, Algernon Tollemache. Well, where was that situate? It seems to me that it can only be said to have been situate in this country. Indeed, I do not think it was seriously disputed on the part of the appellants that unless their contention could be made out that there

(1) [1897] A. C. 11, 19.

was a right to these particular assets in Mrs. Tollemache or her executors, probate duty is payable upon the whole sum, and the whole of it must be regarded as an asset situate in this country." In my judgment, substituting for the specific right to the mortgages, a claim to a specific right in this case to any particular item of income, that reasoning leads quite clearly to the conclusion that in this case the property is situate in the State of New York—namely, in the place to which the lady would have to resort for the purpose of asserting that equitable right to have handed over to her the net income of the estate subject to all proper deductions and, of course, after taking into account any claim that might arise by persons interested in remainder subject to her life interest, that a sum paid on account of income was in fact a sum part of which should be retained as capital.

In my judgment, therefore, the case falls to be taxed within r. 2 of the rules applicable to Case V. as income from a foreign possession, and the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Boulton, Sons & Sandeman.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

R. M.

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1926

Feb. 26;
March 10, 11, 26.

[IN THE COURT OF APPEAL.]

LOWTHER *v.* CLIFFORD.

[1924. L. 2993.]

Landlord and Tenant — Lease — Lessee's Covenant to pay "all assessments, impositions and outgoings" — Holding over — Tenancy from Year to Year—Market Garden—Expenses under Private Street Works Act, 1892 *—Liability of Tenant—Recovery of Expenses—Tribunal—Action at Law —Arbitration—Agricultural Holdings Act,* 1923 (13 & 14 *Geo.* 5, *c.* 9), *ss.* 16, 54, 57.

A lease granted to the defendant in 1885 for seven years of nine acres of agricultural land contained a covenant by him to pay "all assessments impositions, and outgoings now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises except the landlord's property tax."

The lease expired, and after the defendant had held over as a yearly tenant for thirty-three years, the local authority made up and paved the road, formerly a lane, upon which the demised land abutted, under the Private Street Works Act, 1892, and demanded and received payment of the expenses so incurred from the plaintiffs, who were the landlords. The plaintiffs then sought in this action to recover the sum so paid from the defendant, who denied liability and objected to the jurisdiction of the Court on the ground that the claim could only be determined by arbitration under s. 16 of the Agricultural Holdings Act, 1923:—

Held by the Court of Appeal:—

(1.) That the defendant held over upon the terms of the lease and that the covenant in question was not inconsistent with a yearly tenancy.

Hyatt v. *Griffiths* (1851) 17 Q. B. 505; *Dougal* v. *McCarthy* [1893] 1 Q. B. 736; and *Batchelor* v. *Bigger* (1889) 60 L. T. 416 followed.

(2.) That the words of the covenant were wide enough to negative the suggestion that the expenses were not within the contemplation of the parties when the lease was made.

Foulger v. *Arding* [1902] 1 K. B. 700 and *Stockdale* v. *Ascherberg* [1904] 1 K. B. 447 applied.

Valpy v. *St. Leonard's Wharf Co.* (1903) 67 J. P. 402; 1 L. G. R. 305; and *Harris* v. *Hickman* [1904] 1 K. B. 13 not followed.

Decision of McCardie J. [1926] 1 K. B. 185 on these points affirmed.

(3.) That the land was a market garden, and consequently a "holding" within s. 57 of the Agricultural Holdings Act, 1923.

(4.) That s. 16 of that Act was not to be read with an unrestricted meaning, but that its operation was limited to questions referred to arbitration by other sections of the Act, whether arising during the continuance of the tenancy or after its determination.

The decision in *Rex* v. *Powell* [1925] 1 K. B. 641, upon the construction of s. 16, adopted with reservation in *Harrison* v. *Ridgway* (1925) 133 L. T. 238, disapproved.

(5.) That there was no such clear expression in s. 16 as would, by compelling arbitration, be sufficient to deprive the plaintiffs of their right, preserved by s. 54, to sue in the King's Courts, and that they were entitled to recover in this action the expenses in question.

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APPEAL from McCardie J. (1)

The plaintiffs were the present owners of certain land known as Lord's Close, some nine acres in extent, fronting Ferry Road (formerly Ferry Lane), Barnes, in the county of Surrey. On May 14, 1885, the plaintiffs' predecessors in title granted to the defendant a lease under seal of the land for a term of seven years from September 29, 1884. On the expiration of the term the defendant held over, continuing and ever since remaining in occupation of the land, paying the yearly rent of 46*l.* 5*s.* reserved under the lease as tenant from year to year.

The lease contained a covenant by the defendant that he would "pay during the said term all taxes, rates, tithes, assessments, impositions and outgoings now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises except the landlord's property tax."

By notice dated October 24, 1924, the Barnes Urban District Council required the plaintiffs to pay 188*l.* 2*s.* 9*d.* and interest thereon at 4*l.* per cent. per annum assessed upon the land in question in respect of expenses incurred for paving and making-up Ferry Road under the Private Street Works Act, 1892, and on December 17, 1924, the plaintiffs paid that sum and the interest thereon to the Council.

The plaintiffs sought in this action to recover from the defendant the total sum so paid.

The defendant pleaded in his defence (1.) that the covenant in the lease was not a covenant applicable to a yearly tenancy or, in the alternative, was not an assessment, outgoing or imposition, within the contemplation of the parties to the lease, and (2.) that the claim was not maintainable in an action at law by reason of the Agricultural Holdings Act, 1923, s. 16.

(1) [1926] 1 K. B. 185.

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Before the trial of the action, the defendant took out a summons before the Master to stay proceedings on the second ground raised in his defence, but the Master decided to allow the action to proceed, and the defendant did not appeal from that decision.

From the evidence at the trial, it appeared that the land was planted with fruit trees, under which flowers and vegetables, particularly rhubarb, were grown, the produce of which was sent regularly to Covent Garden Market for sale.

McCardie J., after finding (inter alia) that the plaintiffs' surrounding estate was suitable for building purposes, held that the payment was an imposition or outgoing for which the tenant was liable within the meaning of the covenant, and that his liability was not affected by the fact that the tenancy was a yearly tenancy only; that the land in question was an orchard and not a market garden or holding within s. 57 of the Agricultural Holdings Act, 1923, but that, even if it was a holding within that section, s. 16 of that Act did not apply so as to exclude the jurisdiction of the Court.

The defendant appealed. The appeal was heard on February 26 and March 10 and 11, 1926.

Eustace Hills K.C. and *Elliot Gorst* for the appellant. This is not a usual covenant in a yearly tenancy, and is not therefore imported. There is no reported case in which either a yearly tenant or a tenant occupying premises for trade purposes, has been held liable for such an expense as this. It is not applicable to a yearly tenancy, and even if the terms of the covenant would cover the expenditure in question, the defendant cannot be presumed to have intended to become a yearly tenant on the terms of such an obligation: *Valpy* v. *St. Leonard's Wharf Co.* (1); *Harris* v. *Hickman* (2), both of which authorities are distinguishable from *Stockdale* v. *Ascherberg* (3), where a tenant for three years took premises with a defective drainage system, the remedying of which

(1) 67 J. P. 402; 1 L. G. R. 305. (2) [1904] 1 K. B. 13.
(3) [1904] 1 K. B. 447.

might reasonably have been within the contemplation of the parties. "In considering the meaning of the word 'outgoings' it is necessary to remember that a covenant of this character must be assumed to relate only to matters which may be reasonably supposed to have been contemplated by the parties as being within the purview of the covenant": per Sankey J. in *Henman* v. *Berliner*. (1) We rely on that as showing that as a matter of law, "outgoings" do not always include expenses such as those under the Private Street Works Act, 1892. *Foulger* v. *Arding* (2) is to the same effect.

In the present case there was no reason to anticipate that there would be any such expenses. Ferry Lane was sufficient for the purposes for which the land was demised. Ferry Road, as such, did not then exist, and in considering the rights of the parties after the expiration of the lease, this covenant ought not to be imported into the subsequent yearly tenancy. The terms and conditions of the original tenancy only apply "so far as they are applicable to a yearly tenancy": per Cozens-Hardy M.R. in *Morgan* v. *William Harrison, Ld.* (3); *Dougal* v. *McCarthy* (4); and it would be a very strong thing to import this covenant against an agricultural holding such as this when, as McCardie J. found, the plaintiffs' estate had become suitable for building purposes and the character of it was being altered. What was within the contemplation of the parties at the time of the lease is a most important consideration: *Tidswell* v. *Whitworth* (5); *Wilkinson* v. *Collyer* (6); *Batchelor* v. *Bigger* (7); *In re Warriner* (8); *Harris* v. *Hickman* (9); *Stockdale* v. *Ascherberg*. (10)

Further, this action is not maintainable. This land is cultivated wholly for the trade or business of market gardening and is a "holding" within s. 57 of the Agricultural Holdings Act, 1923, and consequently the only proceeding open to the plaintiffs in respect of this claim is by a reference

(1) [1918] 2 K. B. 236, 239.
(2) [1902] 1 K. B. 700.
(3) [1907] 2 Ch. 137, 143.
(4) [1893] 1 Q. B. 736.
(5) (1867) L. R. 2 C. P. 326.
(6) (1884) 13 Q. B. D. 1.
(7) 60 L. T. 416.
(8) [1903] 2 Ch. 367.
(9) [1904] 1 K. B. 13.
(10) [1904] 1 K. B. 447.

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to arbitration under s. 16 of the Act. That is not merely a procedure section; if it were, it would be superfluous having regard to the Second Schedule to the Act. The words of the section are plain and unambiguous. This is a claim arising on a question relating to the construction of the contract during the tenancy, and the section says that it "shall be determined" by arbitration in manner therein specified. The only authority in point on this question is *Westwood* v. *Barnett* (1), where the Scottish Court was of opinion that questions of construction can be determined during the tenancy, the relevant section of the Scottish Act corresponding with s. 16. *Simpson* v. *Batey* (2); *Rex* v. *Powell* (3); and *Harrison* v. *Ridgway* (4) left open the question of construction during the tenancy. We submit that the words of s. 16 are imperative, and that the only method of trying this claim is by arbitration.

Holman Gregory K.C. and *Wynn Werninck* for the respondents. We submit (1.) that no question arises on this appeal which falls within the purview of the Agricultural Holdings Act, 1923; (2.) that it is not open for the appellant to consent to the Court's seisin of the case and then, when the Court is adverse to his contention that he is not liable under the lease, turn round and say that arbitration is the sole method of determining the question, and (3.) that s. 16 does not take away the common law right of a landlord in a case like this.

The real question is, what was the contract? It is not a question of construction at all. The words of the covenant are abundantly plain. The terms of the lease are not inconsistent with a yearly tenancy, and when he held over, he did so upon the same terms. That has been well established by the cases already cited.

This claim does not come within s. 16 of the Act of 1923. The respondents' common law rights are expressly saved by s. 54, and even if by virtue of s. 16, sub-s. 5, the respondents are deprived of the benefit of s. 4 of the Arbitration Act, 1889, those rights are still preserved. The law on this

(1) 1925 S. C. 624.
(2) [1924] 2 K. B. 666.
(3) [1925] 1 K. B. 641.
(4) 133 L. T. 238.

question was fully discussed by Fletcher Moulton L.J. in *Doleman & Sons* v. *Ossett Corporation*. (1) Sect. 16 gives rights unknown to the common law which are not to be determined by action, but when the rights are known to the common law the Act does not bar the ordinary procedure: Spencer's Agricultural Holdings Acts, 7th ed., p. 66.

McCardie J. on the evidence came to the conclusion that this land was not a market garden and did not come within the definition of a "holding" in s. 57 of the Act. We rely upon that as showing that the Act has no application.

It is not open to the appellant now to raise the question of jurisdiction. The Master refused to stay the proceedings on that ground, and there was no appeal from his decision.

Eustace Hills K.C. in reply.

Cur. adv. vult.

March 26. LORD HANWORTH M.R., after stating the facts: The defendant's counsel did not seriously contend that if the covenant is binding upon the defendant the sum sued for is not within its wide words. The words "impositions" and "outgoings" have been held in cases brought to our notice to be embracing terms, more particularly where the subsequent words set out above are added to them; see the summary of the effect of the cases given by Wright J. in his judgment in *Smith* v. *Robinson*. (2)

The points insisted upon before this Court on behalf of the defendant were, first, that this covenant does not apply to a tenancy from year to year created by holding over and paying rent for premises, because (*a*) it is not suitable to or conformable with such a tenancy, and (*b*) it cannot have been in the contemplation of the parties at the time when the defendant originally took the lease of the land in 1885, or in 1891 when the tenancy from year to year began; for the land has no house upon it, the lane, or road as it then was, fulfilled the requirements of the defendant, and the sum

(1) [1912] 3 K. B. 257. (2) [1893] 2 Q. B. 53, 56.

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now claimed is disproportionate to the rent paid for, and the character of, the holding of which the defendant has remained tenant.

This argument, in my judgment, fails. As to (*a*), it appears to me, clear that when a tenant holds over, he holds upon the terms of the agreement or lease, which are not inconsistent with a tenancy from year to year. This has been definitely decided in this Court: see per Lord Campbell in *Hyatt* v. *Griffiths* (1); *Dougal* v. *McCarthy* (2); and *Batchelor* v. *Bigger*. (3) There is no inconsistency in attaching such a covenant to a tenancy from year to year.

As to (*b*), it is true that the test whether such a liability or result could have been contemplated by the parties at the time when the contract was entered into, has been laid down in several cases, as in *Thompson* v. *Lapworth* (4), per Willes J., and in *Foulger* v. *Arding* (5), per Collins M.R.; *Harris* v. *Hickman*. (6) But in *Foulger* v. *Arding* (5) the Court held the tenant liable in respect of an abatement of a nuisance upon the premises where the covenant was less inclusive than it is in the present case, and in *Stockdale* v. *Ascherberg* (7) Collins M.R. himself said: "If a tenant makes an agreement in perfectly clear and unambiguous terms that he will bear all outgoings, I do not see how we can throw aside the plain meaning of the language used, and introduce some limitation of that meaning, which it would be very difficult, if not impossible, to define." That reasoning applies with great force to the present case, where the covenant clearly states that the tenant undertakes liability for impositions and outgoings "now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises." Such words seem aptly drawn to include the unknown and uncertain, as well as such payments as experience has led the tenant to expect.

Valpy v. *St. Leonard's Wharf Co.* (8) was not followed by

(1) 17 Q. B. 505, 509.
(2) [1893] 1 Q. B. 736.
(3) 60 L. T. 416, 418.
(4) (1868) L. R. 3 C. P. 149, 159.
(5) [1902] 1 K. B. 700, 706.
(6) [1904] 1 K. B. 13.
(7) [1904] 1 K. B. 447, 450.
(8) 67 J. P. 402.

Wright J. in *Stockdale* v. *Ascherberg* (1), and I prefer the decision of Wright J. in this later case. His decision in it was confirmed by the Court of Appeal (2) and led to the observations made by the Master of the Rolls which I have already quoted.

The defendant's second point was that the land held by him was a market garden; that s. 16 of the Agricultural Holdings Act, 1923, applied; that the effect of that section was to refer such a question as that at issue between the parties to arbitration and to exclude the plaintiffs from enforcing their rights by an action at law. Logically, this point ought to have been argued first, and it was said that the defendant had taken his chances in the action before McCardie J. and could not now insist upon the point. It appears also that the defendant did take out a summons to stay proceedings before the Master, but rested content with his decision allowing the action to proceed. In spite of these criticisms, I do not think that the defendant has lost his right to take the point. He pleaded it in para. 13 of his defence, and I proceed to deal with it.

The land is, in my judgment, within the definition of a market garden in s. 57. It was cultivated "wholly or mainly" in order that all the crops upon it might be sold in the course of trade or business in the Covent Garden Market, and the crops included fruit and some of those specified in the Third Schedule—rhubarb particularly forming a large part of the plants grown. It is necessary, therefore, to determine the effect of s. 16. In doing so, it is important to remember the terms of s. 54: "Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right or remedy of a landlord, tenant or other person vested in or exercisable by him by virtue of any other Act or law under any custom of the country or otherwise in respect of any contract of tenancy or other contract," etc. This latter section clearly reserves the landlord's right to resort to the Courts for his remedy by an injunction to restrain the tenant who exercises

(1) [1903] 1 K. B. 873. (2) [1904] 1 K. B. 447, 450.

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his freedom of cropping under s. 30, sub-s. 1, to the injury or deterioration of the holding: see s. 30, sub-s. 2.

Sect. 36 provides that the tenant's remedies for wrongful distress are to be sought in the county court or in a court of summary jurisdiction, although it is possible that the rights of the landlord and tenant may depend upon the construction of the contract of tenancy. Thus the words in s. 16: "any other question or difference of any kind whatsoever between the landlord and the tenant of the holding . . . . arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy," must be limited in some way. Furthermore, by sub-s. 2, any claim that is within s. 16 ceases to be enforceable after the expiration of two months from the termination of the tenancy unless the requirements of the section as to the delivery of particulars have been complied with—a provision that appears inconsistent with, and inappropriate to, the rights and remedies of a landlord and tenant, inter se, generally.

The section presents many and obvious difficulties. In *Rex* v. *Powell* (1) it was decided that the questions to which the section referred were those which arose out of the termination of the tenancy. That case was followed as binding upon them by Bankes and Scrutton L.JJ., sitting as a Divisional Court, in *Harrison* v. *Ridgway* (2), but the report makes it clear that both learned judges doubted its authority. It does not appear to me that all the matters covered by the earlier part of the section can be restricted by the words "arising out of the termination of the tenancy of the holding," for the provisions of s. 12, sub-ss. 3, 4 and 5, dealing with the demand by the tenant for arbitration as to the rent to be thereafter paid as from a date at which the tenancy could have been terminated, are matters to which s. 16 applies, but do not arise except hypothetically out of the termination of the tenancy. Sect. 11 gives a right to compensation for damage by game to be determined by arbitration, and clearly during the continuance of the tenancy. Sect. 27 gives the landlord power to resume

(1) [1925] 1 K. B. 641. (2) 133 L. T. 238.

possession of a part of his tenant's holding upon paying compensation—it may well be upon the continuance of the tenancy as to the balance of the acreage left—and yet by sub-s. 2 the amount of the compensation payable to the tenant is to be determined by an arbitrator, within s. 16.

In my judgment, s. 16 is not to be read with an unrestricted meaning. Sect. 54 justifies the view that express words must be found if the ordinary right of a landlord or tenant to resort to the Courts is to be held to have been taken away. The section applies to matters which are by the Act referred to arbitration—to matters which fall within the contract of tenancy, that is, as interpreted by s. 57, matters within the letting of, or agreement for letting the land—matters relating to the cultivation of the soil, the rotation of crops, the making of improvements, or in respect of the holding.

But there may be, and often are, matters dealt with, and contained in, a contract of tenancy which are collateral to the demise created under it and lie outside the purpose of the Acts which were consolidated in the Act of 1923. The covenant in question in the present case deals with a demand falling from outside upon the landlord or tenant, who may both be united in their objection or resistance to it, and is remote from those matters for which the Agricultural Holdings Acts successively have provided compensation to the tenant, while to some extent limiting the matters on which the tenant was given a free hand as against his landlord. So too when a question arose whether a new tenancy had been created, as in *Simpson* v. *Batey* (1)—a point not germane to the existing tenancy. On such a matter and the like, the rights of all persons are preserved by the opening words of s. 54; and unless clear words are used, the landlord's ordinary rights as to the contract of tenancy or other contract have not been affected. It certainly lies upon the defendant to show that the plaintiffs' right of action has been taken away.

For the reasons given, the defendant has not, in my judgment, done this, and his appeal fails on this point also. I will add that I am disposed to assent to the view expressed

(1) [1924] 2 K. B. 666.

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by Scrutton L.J. in *Simpson* v. *Batey* (1), that s. 16 deals with procedure. It gives an alternative system in several particulars to that of the Arbitration Act which it declares shall not apply to any arbitration under this Act. It is, however, not essential to rely upon this ground for the reasons that I have stated in dealing with the effect of the section. The appeal must be dismissed with costs.

SCRUTTON L.J. In this case a landlord claims from a tenant a sum of 188*l.* apportioned or assessed on the land in proportion to its frontage, in respect of the expenses of the local authority in making up a road bordering the land. The tenant originally held the land on a seven years' lease, and on its expiration held on as tenant from year to year for some thirty years without any written agreement, but paying the rent (46*l.*) reserved in the lease. That document contained a clause that the tenant should " pay all taxes, rates, tithes, assessments, impositions and outgoings now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises."

The tenant replied to the claim : (1.) that the clause quoted, if it covered the claim during the period of the lease, was not applicable to a yearly tenancy by holding over ; (2.) that the King's Courts had no jurisdiction to deal with the matter, except by way of appeal on special case stated by an arbitrator, a course which had not been pursued. The course taken by the plaintiff and the course suggested by the tenant would both result in the matter coming for decision to the Court of Appeal. Logically, the first contention of the appellants, though their counsel gave it the second place in his argument, was that the High Court of Justice had no jurisdiction to determine this dispute, as under the provisions of s. 16 of the Agricultural Holdings Act, 1923, it must be determined by arbitration.

To deal with this point, it is first necessary that the land, the subject of the tenancy, should be a " holding " within the Act of 1923. It will be such a holding, if it is " in whole

(1) [1924] 2 K. B. 666.

or in part cultivated as a market garden." The judge below has found it is not such a holding, as it is really a "plum orchard." I am unable to take this view. The produce of the trees and the crops of vegetables grown under them are sent regularly to Covent Garden Market for sale, and the land seems used substantially for no other purpose. The use of the land is to grow fruit, vegetables, and flowers for market; it seems to be essentially a market garden. I cannot take this way out of the difficulty.

The Court is thus driven to face the difficult and important question of the meaning of s. 16 of the Act of 1923. That section uses words capable of a very wide meaning. Certain matters "shall be determined by a single arbitrator in accordance with the provisions set out in the Second Schedule." Those matters are defined in very general words, which include "Any question or difference arising out of any claim . . . . for sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant . . . . for any breach of contract or otherwise in respect of the holding"—those words could be made to cover almost any dispute between a landlord and tenant. But do they really include a claim for rent, or ejectment, or a dispute as to whether distress is wrongful or rightful, or an application by a tenant for relief from forfeiture, or by a landlord for an injunction to enforce the contract of tenancy—in short, for the common law and statutory rights which existed before, and independently of, the Agricultural Holdings Acts and were cognizable by the King's Courts? Can arbitrators grant injunctions or relieve from forfeiture? Are the King's Courts prevented from trying an action of ejectment or a claim for rent in respect of an agricultural holding?

Sect. 54 of the Act provides that, except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord in respect of a contract of tenancy. We have therefore to look for express destruction of the right of the King's subjects to enforce lawful contracts in the King's Courts. We find that s. 30, sub-s. 2, recognizes

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the landlord's right to obtain at any time an injunction and damages for cultivation deteriorating the holding. An arbitrator cannot grant an injunction; it would be curious if the landlord had to claim damages before one tribunal and an injunction before another. Sect. 36 contemplates that disputes as to distress "may" (not "shall") be determined before a county court or a court of summary jurisdiction, though it is not clear whether the latter court can give damages.

When one considers the rest of the Act, one finds a series of rights given to the landlord or tenant to recover sums which are to be fixed by arbitration. Thus s. 1 gives the tenant, who has made on his holding an improvement within the First Schedule to the Act, a right on the termination of the tenancy to receive compensation, and s. 5 provides that any difference as to this compensation "shall be settled by arbitration." Sect. 9 gives a tenant, who has improved a holding by "high farming" beyond the obligations of his contract of tenancy, a right to receive from an arbitrator appointed under this Act compensation. Similarly by s. 10, where a landlord proves to the satisfaction of such an arbitrator that the tenant has deteriorated the holding by failing to cultivate it according to the rules of good husbandry in the contract of tenancy, the landlord may recover from the arbitrator compensation for such deterioration, but this is not to prevent the landlord from claiming compensation for dilapidations or the deterioration of the holding under the contract of tenancy. How he is to claim this compensation is not expressly stated, but the Court, in *In re Arden and Rutter* (1), held that the claim, if under the contract of tenancy, would not be under s. 16, as the Act was to be construed, if possible, so as not to deprive any person of his existing common law rights. The claims under both ss. 9 and 10 arise on the termination of the tenancy. Under s. 11, the tenant in certain cases of damage by game is entitled during the tenancy to compensation from his landlord, and such compensation is to be determined by arbitration.

(1) [1923] 2 K. B. 865.

Under s. 12, a tenant ejected from his holding by his landlord for other than specified reasons, one of which is the tenant's refusal to arbitrate as to future rent, that is, rent payable after a day on which the existing tenancy would be terminated, is entitled to compensation. The section does not seem expressly to provide that the compensation is to be fixed by arbitration, but refers incidentally (sub-s. 6) to "the costs of an arbitration to determine the amount of the compensation," and (sub-s. 8) to the arbitrator reducing compensation, and does, oddly enough, expressly require arbitration as to future rent where an agreement has been made to arbitrate (sub-s. 5(*a*)), and provides for arbitration as to cultivation according to the rules of good husbandry. Sect. 10 of the Act of 1920, which this long section replaces, did by s. 12 expressly provide that the compensation should be recoverable in the same manner as compensation for improvements, but this provision is omitted in sub-s. 11 of s. 12 of the Act of 1923. Sect. 13 enlarges the compensation given by s. 12. Sect. 14 (inter alia) enables a court of summary jurisdiction to determine compensation as to workmen occupying cottages by service.

So far, the Act has been establishing a series of rights to compensation which did not exist at common law, and the amount of which, with matters incidental thereto, has already been expressly directed to be referred to arbitration. One does not see, therefore, why it was necessary to refer them again to arbitration by s. 16; but one can see why, if it was not intended to proceed under the Arbitration Act, s. 16 was wanted to provide the method of arbitration, and of appeal, if any, therefrom. Sect. 16 does refer the matters it deals with to the arbitration of a single arbitrator according to the provisions of the Second Schedule, and does exclude the operation of the Arbitration Act, 1889, and does provide an appeal by way of special case to the county court, and thence to the Court of Appeal. This forces on one's attention the possible construction that the questions and differences dealt with are only those on rights created by the Act and already by the Act referred to arbitration, and that the

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section is a procedure section providing how questions by other sections of the Act referred to arbitration are to be decided—namely, by a single arbitrator according to the Second Schedule. The framework of the section would then be "Any question or difference (as described in detail) which under this Act is referred to arbitration shall be determined by a single arbitrator," and so on.

The statutory history of the matter is as follows. By s. 8 and following sections of the Agricultural Holdings Act, 1883, compensation claimed under s. 1 of the Act was to be settled by agreement or by a reference either to one arbitrator if agreed, or two if not so agreed. There was a general saving clause, s. 40, of all legal rights. In the Agricultural Holdings Act, 1900, there was a similar provision that compensation was to be settled in accordance with the agreement of the parties, or, if there was no agreement, by arbitration under the Second Schedule of the Act, which provided that the reference should be to a single arbitrator. The provision as to a single arbitrator was also in the Act (s. 2, sub-s. 5). But a provision was added that where a tenant claimed compensation, if either party claimed any sum in respect of matters described in general words: "and any sum is claimed to be due to the tenant from the landlord in respect of any breach of contract or otherwise in respect of the holding," such party might by notice require such claim to be brought into the arbitration. The claim in each case must be for "a sum." Only the claimant could bring the question into arbitration, and he need not. The saving clause in the Act of 1883 was incorporated. The Act of 1908 repeats the provision of the Act of 1900 (s. 2), and the saving clause (s. 46), and provides (s. 10) that compensation for damage by game, and (s. 11) compensation for disturbance shall be settled by arbitration. It then for the first time (s. 13) contains a clause that all questions which either under the Act or the contract of tenancy are referred to arbitration shall be settled by a single arbitrator in accordance with the Second Schedule. Under this clause obviously only what had previously in the Act or the contract of tenancy referred to arbitration is dealt with.

In the Act of 1920 a very elaborate provision for compensation for disturbance appears (s. 10), and sub-s. 12 provides that it is to be recovered in the same manner as compensation for disturbance. But in s. 18 the draftsman, while leaving s. 6, sub-s. 1, and s. 13, sub-s. 1, of the Act of 1908 unrepealed, has repeated s. 6, sub-s. 2, of that Act, and repeated its language with modifications. The claims by the landlord are no longer limited to "sums" but are "questions arising out of any claim," and the words are added which afterwards appear in the Act of 1923: "and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof"; and finally these questions are to be determined by arbitration under the Act of 1908, which sends one back to the unrepealed s. 13 of that Act, which is limited to questions under the Act referred to arbitration. The saving clause of the Act of 1908 is incorporated. Lastly, s. 16 of the Act of 1923 repeats the language of s. 18 of the Act of 1920, adding at the end of the list of subject-matters "and any other question which under this Act is referred to arbitration," and refers these matters to a single arbitrator. It is not surprising that it is difficult to find one's way through this maze of statutory provisions. The reported cases so far agree only in this, that the Courts have not yet stayed any proceedings in the Courts because of s. 16 of the Act of 1923, or its predecessors; though they have used various reasons to achieve this result.

In *Simpson* v. *Batey* (1), decided on April 30, 1924, this Court declined to stay under s. 16 an action of ejectment against tenants under an expired notice to quit, who alleged that the notice to quit had been waived. All the members of the Court held that it was not a question arising out of the termination of the tenancy, one of them on the ground that the question was whether a new tenancy had or had not been created. The same Lord Justice suggested (2) that the true construction might be that the section was

(1) [1924] 2 K. B. 666. (2) [1924] 2 K. B. 672.

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only a procedure section prescribing the method of arbitration. In *Rex* v. *Powell* (1), decided on January 23, 1925, the Divisional Court prohibited an arbitrator from deciding whether a tenancy had been determined, and if so what compensation was payable to the tenant. The facts were odd; the landlord gave a notice to quit, and then said it was waived by consent. The tenant denied that the notice was waived, but yet (1.) stayed on in the tenancy, and (2.) claimed compensation for its determination. The Divisional Court held that the question whether the tenancy was determined was not a question for arbitration, and that the words "on the determination of the tenancy" applied to all words before it, and therefore no claim for compensation could be determined by arbitration when the tenant had not terminated his tenancy. In *Harrison* v. *Ridgway* (2), decided on March 26, 1925, Bankes L.J. and myself, sitting as additional judges of the King's Bench Division, had a case before us where the tenant sued in the county court for damages for breach of a covenant by the landlord to put gates in order at the commencement of the tenancy, and the landlord replied that the court, by reason of s. 16, had no jurisdiction. As judges of the King's Bench Division, we felt ourselves bound to follow the decision in *Rex* v. *Powell* (1), as the matter clearly did not arise on the termination of the tenancy, but we reserved our liberty as Lords Justices, if the question then came before us. I thought then, and still think, that the reasoning in *Rex* v. *Powell* (1) could not be sustained. I saw no more reason to apply the word, "arising out of the termination of the tenancy," to all the preceding classes of cases than to apply the following words: "arising as to the construction of the contract of tenancy." In fact, claims for damage by game, under s. 11 of the Act of 1923, which clearly come within the words of s. 16, "sums due to the tenant from the landlord, ... otherwise in respect of the holding," are by s. 11 made recoverable at the end of each calendar year, and before the termination of the tenancy. The Scottish

(1) [1925] 1 K. B. 641. (2) 133 L. T. 238.

Court came to the same decision as that in *Rex* v. *Powell* (1) in the case of *Westwood* v. *Barnett* (2), decided June 6, 1925, in which *Harrison* v. *Ridgway* (3) was not referred to. The claim was for miscropping under s. 35 of the Scottish Act, which corresponds to s. 30 of the English Act, and in view of sub-s. 2 of these sections it is not easy to see how s. 16 could be relevant. But the Scottish Court excluded it by holding that the word "other" carried the condition of termination of the holding back to all the preceding cases. If "other" has this carrying force, it must, I suppose, also carry back the term about "construction of the contract of tenancy," and the term "which by this Act is referred to arbitration." The Scottish judgments are, if I may respectfully say so, admirable expositions of the difficulties of construction of s. 16, but for the reasons I have given I do not think their solution is the best way out of the difficulty. If it is correct, the defendant's argument fails, for this claim for road expenses certainly does not arise out of the termination of the tenancy. If it is not correct, I approach the matter in this way. The landlord's claim is for sums payable under a tenancy contract, and has prima facie nothing to do with the Agricultural Holdings Act. I am told by that Act (s. 54) not to interfere with such a right "except as expressed in the Act." I am entitled, in my view, to require a clear expression of an intention to deprive one of the King's subjects of his right to sue in the King's Courts; and I do not find such a clear expression in s. 16 which I think can be satisfied, though I recognize, as the Scottish judges do, the difficulties of construction, by limiting its operation to questions referred to arbitration in other sections of the Agricultural Holdings Act. For these reasons, in my opinion, the objection to the jurisdiction fails.

There remains the question whether the tenant is liable to make this payment under the terms of his tenancy. I cannot entertain any doubt that if the question arose during the seven years' lease the wide words of the covenant are strong

(1) [1925] 1 K. B. 641. (2) 1925 S. C. 624.

(3) 133 L. T. 238.

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enough to impose upon the tenant a liability to pay the sum claimed. It is either an imposition or an outgoing, or both; I incline to think that "assessment" is also a very suitable word to express it. And I do not see any difficulty when a tenant who has occupied the premises on terms of incurring this liability for seven years stays on for another year, or indeed for thirty other years, in implying that he stays on on the terms on which he previously held. I sympathize very much with the views of Collins M.R. in *Stockdale* v. *Ascherberg* (1), where he declined to free a tenant for three years at a rent of 55*l.* a year who had contracted to pay all outgoings, from a claim of 83*l.* for expenses of abating a drainage nuisance, on the ground of its disproportion to the rent. Collins M.R. said: "I do not see how we can throw aside the plain meaning of the language used and introduce some limitation of that meaning which it would be very difficult, if not impossible, to define." It seems to me that a tenant holding under a lease under which he contracted to pay rates and outgoings imposed on the premises if he held over as a yearly tenant would be clearly liable to pay rates, and I do not see how to relieve him of outgoings because of their amount. In my view, the decision of Farwell J. in *Valpy* v. *St. Leonard's Wharf Co.* (2), followed by Wright J. in *Harris* v. *Hickman* (3) to the contrary effect, was erroneous.

For these reasons the appeal should be dismissed with costs. The appellant has the consolation that if he had succeeded in driving the plaintiff to claim by arbitration under the Agricultural Holdings Act, the Court of Appeal would ultimately have come to the same decision under the covenant.

SARGANT L.J. The first question here is the construction of the covenant in the lease, and on this question I have no hestitation in agreeing with the judgment of McCardie J. The covenant is couched in the widest possible terms, is

(1) [1904] 1 K. B. 450. (2) 1 L. G. R. 305.
(3) [1904] 1 K. B. 13.

quite free from ambiguity, and obviously includes an imposition or outgoing of the kind in question. And, this being so, there is not in my judgment any room for modifying the clear words of the covenant by any considerations based on the length of the term granted by the lease, the condition of the property or the disproportion between the rent reserved and the amount of the imposition in question. The case is one to which the "fundamental principle" or "golden rule" applies which was repeated by Lord Wensleydale in *Abbott* v. *Middleton*. (1) But if more specific authority as to the construction of covenants of this kind is required, it can be found in the judgment of Collins M.R. in *Stockdale* v. *Ascherberg*. (2)

If, then, this was so during the term of the original lease, is any difference caused by the fact that this lease has long since expired, and that since its expiration the lessee has continued to hold over as an annual tenant and at the old rent, but without any express new bargain? The answer to this question must, in my judgment, be in the negative. The rule of law in such cases is well settled, and is that the tenant is deemed to hold on the terms of the original letting, so far as these terms are not inconsistent with an annual tenancy: see *Dougal* v. *McCarthy*. (3) And it is clear that the two somewhat different phrases used by Cozens-Hardy M.R. in *Morgan* v. *Wm. Harrison, Ld.* (4), are not intended to modify this well known rule. Now the covenant for payment of outgoings was obviously as much one of the terms of the tenancy regulating the relations of landlord and tenant as a covenant to pay rent or to do repairs, and was not a contract outside and independent of that relationship, such as an option to purchase: *In re Leeds and Batley Breweries*. (5) And, however wide and sweeping the words of such a covenant may be, they are not, in my view, inconsistent with an annual tenancy. I may add that I agree with the learned judge in his view that *Valpy* v. *St. Leonard's*

(1) (1858) 7 H. L. C. 68, 114, 115.
(2) [1904] 1 K. B. 447.
(3) [1893] 1 Q. B. 736.
(4) [1907] 2 Ch. 137.
(5) [1920] 2 Ch. 548.

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Wharf Co. (1) and *Harris* v. *Hickman* (2), which followed it, are contrary to the general current of authority and cannot be relied on.

It has, however, been argued that any original jurisdiction of the Court here has been excluded by s. 16 of the Agricultural Holdings Act, 1923. As to this McCardie J. has held that the tenancy does not form a holding within the Act at all, by reason of its not having, within s. 57 of the Act, been cultivated wholly or mainly for the purpose of the trade or business of market gardening. But I cannot agree with this view. The notes of the evidence of the original defendant Clifford satisfy me that the cultivation was such as to satisfy the definition in s. 57. This ground for holding that s. 16 does not apply, therefore, fails.

Then, if so, is the application of s. 16 excluded on the ground taken in *Rex* v. *Powell* (3)—namely, that the question is not one arising on the termination of the tenancy ? After a very careful consideration of that case, I cannot agree with the reasoning in it, even if the decision is to be taken as limited only to that part of s. 16, sub-s. 1, which precedes the words " or arising whether during the tenancy or on the termination thereof as to the construction of the contract of tenancy." And I would point out, as an addition to the criticisms on *Rex* v. *Powell* (3) which were formulated by Bankes and Scrutton L. JJ. in *Harrison* v. *Ridgway* (4), the fact that there can hardly be excluded from the compensation dealt with by the first words of s. 16, the compensation for damage by game given by s. 11 of the Act, and that claims for compensation of this kind would ordinarily arise during the currency of a tenancy. It seems that s. 11 cannot have been brought to the attention of the Court in *Rex* v. *Powell* (3) ; and indeed it appears from the judgment (5) that the counsel showing cause had actually conceded that " the class of question or difference mentioned in the opening words of sub-s. 1 " was a

(1) 67 J. P. 402.
(2) [1904] 1 K. B. 13.
(3) [1925] 1 K. B. 641.
(4) 133 L. T. 238.
(5) [1925] 1 K. B. 647.

"question or difference arising out of the termination of the tenancy of the holding." But there are other and broader grounds for holding that such questions as the present are not within the ambit of s. 16. For determining this ambit great importance is to be attached to the words "and any other question which under this Act is referred to arbitration." When due weight is given to these words and to the express provisions of s. 54 the result is, in my judgment, that the section must be read, not as imposing arbitration afresh, but merely as providing that any arbitration which has otherwise to take place shall be regulated by the special statutory provisions contained in the Second Schedule to the Act. In this respect I felt prepared during the argument to adopt the suggestion to this effect thrown out by Scrutton L.J. in *Simpson* v. *Batey* (1) and again in *Harrison* v. *Ridgway*. (2) And I am confirmed in that view by the conclusive reasoning contained in the present judgment of the Lord Justice, which I have had an opportunity of perusing.

Further, even if on its true construction s. 16 is not merely limited to procedure but has the effect of prescribing arbitration in certain cases, its scope must, I think, at least be limited to the determination of the class of cases with which the legislation in question is concerned, and cannot include questions as to the general rights or liabilities of landlord or tenant in respect of subject-matter entirely outside the provisions of the Act. It was conceded in argument by the appellant's counsel that if there were a provision in a lease of a holding under the Act that the rent should be increased after an interval, and a doubt arose as to the exact period when, on the construction of the lease, the increase should take place, that question would not be removed initially from the Courts and referred to arbitration. And I can find no distinction between a question as to the construction of such a clause and the present question as to the construction of a covenant to pay outgoings. Here again the terms of s. 54 of the Act are most material, and are strongly indicative of an intention to limit the operation of

(1) [1924] 2 K. B. 666, 672. (2) 133 L. T. 238.

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the Act to its particular subject-matter—namely, the cultivation of agricultural holdings, and as to everything outside to leave the legal position of landlords and tenants unaffected.

For these reasons I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *A. L. Bryden, for Garner & Sons, Hounslow.*

Solicitors for respondents: *Foyer, White, Borrett & Black.*

R. M.

C. A. 1926 *June* 26, 28, 29.

[IN THE COURT OF APPEAL.]

RHODES *v.* DIGBY COLLIERY COMPANY, LIMITED.

Workmen's Compensation—Weekly Payments—Discontinuance—Procedure under s. 14 (*c*) *of Workmen's Compensation Act*, 1923, *carried to Conclusion —Order of Registrar for Payment of Money out of Court—No Appeal to Judge—Right of Workman to file Request for Arbitration—New Circumstances—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., paras.* 14, 15—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 14, *cl.* (*c*), *and proviso* (*ii.*).

Where proceedings have been taken by an employer to end or diminish the weekly payments to an injured workman and the procedure prescribed by cl. (*c*) of s. 14 and cl. (ii) of the proviso thereto of the Workmen's Compensation Act, 1923, has been followed and prosecuted by both parties to a conclusion, and an order has been made by the registrar for payment out to the employer of the money paid by him into Court, against which there has been no appeal to the judge, the workman who is dissatisfied with the order is not entitled to ignore the proceedings and to file a request for arbitration unless and until he can show that since the making of the order fresh circumstances have arisen which will justify an independent application for arbitration.

Davies v. *Glyncorrwg Colliery Co.* [1925] 2 K. B. 339; *Prendergast* v. *Lancaster's Steam Coal Collieries, Ld.* (1925), 18 B. W. C. C. 494; and *Starkey* v. *Clayton & Sons* (1925) 18 B. W. C. C. 346 distinguished.

APPEAL from an award of the judge of the Nottingham County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The following statement of facts is taken from the judgment of the Master of the Rolls :—

On December 15, 1917, James Rhodes, the workman in this case, slipped whilst pushing a wagon and slightly ruptured himself. The employers accepted responsibility for the accident and paid him full compensation from the date of the accident until November 20, 1925. The amount of that compensation would have been 20*s.* a week, but by reason of what is called the war addition, it had been increased to 35*s.* a week. When he had been receiving that compensation for something like eight years, it was thought by the employers that he had recovered from the accident, or at least that his condition was so much changed that they sought for an examination of the workman under s. 14 of the Act of 1923. An examination of the workman accordingly took place, upon which it was found, according to the report of the employers' medical practitioner, that he was no longer incapacitated from the accident of eight years before. On November 23, 1925, the employers therefore served on the workman a notice of their intention to diminish the payments they were then making by the sum of 20*s.* a week, in which they stated that they would thereafter pay him 15*s.* a week and no more, instead of 35*s.* a week. A counter-certificate was then obtained by the workman, which implemented on his part the terms of cl. (*c*) of s. 14 of the Act of 1923. The certificate so obtained by the workman was to the effect that he had in part recovered. It was, I think, dated November 26, and stated that the workman was too old to submit to an operation for the hernia and that he would never get any better. On December 1 the two parties, quite rightly, and on what may be called very sensible lines, joined in an application that the question of his incapacity should be submitted to a medical referee on the ground that there was a divergence between the two certificates. On December 5 an order was made by the registrar for a reference to a medical referee. That was in close accord with the code laid down under cl. (*c*) of s. 14. On December 11, 1925, the medical referee made his certificate, which, following the form required

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by the rules under the Act, was in the following terms: "In accordance with the reference made to me by the registrar of the county court of Nottinghamshire holden at Nottingham upon the application of James Rhodes, 233 Vernon Road, Basford, and the Digby Colliery Co., Ld., I have on the 11th day of December, 1925, examined the said James Rhodes and I hereby certify as follows: (1.) The said James Rhodes is seventy years of age. He is suffering from a small hernia of the abdominal wall just above the navel. This hernia is irreducible; it does not contain bowel and is not serious and his condition such"—that is in part in printed words which have not been struck out, but following the form or what is indicated by the form—"This hernia does cause some slight pain if he attempts to do hard work. At his age, together with this condition, he is only fit for some light work." That is a definite expression of opinion that the workman is fit for some light work. Then the certificate goes on: "e.g. lamp cabin or similar work. He is quite fit for this kind of work and is able to walk a reasonable distance (two miles) to his work. The incapacity (for full work) of the said James Rhodes is due to his accident eight years ago." Reading that certificate fairly, it appears to express the opinion of the medical referee without ambiguity—namely, that the workman was still suffering from the accident which occurred eight years previously, that the hernia continued, but that it was not of a serious kind, and that although at his age—and by this time the workman had reached the age of seventy—he could not do hard work, he was able and fit for some light work, and that in order to perform that light work he could walk a distance of say two miles to his work, and the nature of the light work was indicated—namely, work which would be found at a colliery, lamp cabin or other light work. That certificate having been obtained, but a dispute having arisen between the parties as to its effect, the matter was submitted to the registrar for his determination. By cl. (ii.) of the proviso to s. 14 it is provided that if the effect of the certificate is disputed, it may be determined by the registrar, that is to

say, the registrar is charged with the duty of determining the dispute which arises between the workman and the employers as to the effect of the medical referee's certificate. More than that, there is a provision made that, after the registrar has determined that dispute, an opportunity is to be afforded the parties on either side of appealing to the judge. The registrar to whom application was made, gave notice that he would hear the matter, and accordingly on January 14, 1926, it was heard by him and he made the following order: "Upon hearing the solicitors for the said Digby Colliery Co., Ld., and Mr. G. A. Spencer on behalf of the above named James Rhodes, and upon reading (1.) the certificate of the medical referee dated the 11th day of December, 1925, and (2.) the notice of application of the said Digby Colliery Co., Ld., dated the 19th day of December, 1925, for repayment to them of the said sum of 2*l.*, I determine that the said Digby Colliery Co., Ld., is entitled to be repaid the said sum of 2*l.*" That certificate took the form it did for this reason, that after the employers had obtained their certificate from their medical practitioner, they had served the notice, to which I have already referred, in which they stated that they would reduce the sum payable to the workman, by the sum of 20*s.* a week, and thereupon they followed out the procedure under proviso (ii.) and paid into Court a sum which amounted to 2*l.* It is not quite clear why it was 2*l.* and no more, but we are told, and it may well be the case, that it is not to be taken as a total sum, but that the employers indicated thereby their intention to follow out the procedure under proviso (ii.) and they paid into Court a sum showing that they were willing to pay into Court such money as was necessary until the dispute was determined. They did not, however, fulfil their whole duty in paying further sums into Court apparently, because there was a tacit, if not an actual agreement, and when the employers had shown that they were paying money into Court, whether they actually paid the full sum into Court or not was a matter of indifference to both sides. The proviso says that the sums so paid into Court shall, on the settlement of the dispute, be paid out to

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the employer or to the workman according to the effect of the certificate of the medical referee. That means, in my judgment, that one of the questions which must be submitted incidentally to the registrar is: To whom shall that money so paid into Court in order that it may be held in medio between the parties, be ultimately paid? Incidentally for the purposes of that question the registrar has to determine whether or not the weekly payment which the employer is then paying to the workman is adequate in accordance with the certificate of the medical referee. If it is adequate then his decision will be that the money which is held in medio ought to be returned to the employer, whereas if it is determined that it is not adequate, it may be that the right course would be for further consideration to determine what amount ought to be paid to the workman. In the present case we have the case of a simple certificate and a clear decision of the registrar that the employers had paid what was sufficient according to the medical referee's report, with the consequential result that the money then remaining in medio was to be paid back to the employers. There was no appeal from that decision to the judge. We must take it therefore that both sides accepted that decision of the registrar. On March 20, 1926, two applications were made on behalf of the workman. One was for a review of the payments of 15*s.* a week made to him by the employers in reliance on the certificate of the medical practitioner which they had obtained, and the other was for arbitration asking for payment of a sum of 35*s.* a week as from December 3, 1925, when the compensation was reduced to 15*s.* a week. The application for review stood over and still stands over; the application for arbitration came before the learned judge, who made an award on the basis of total incapacity, and ordered that 35*s.* a week as from December 3, 1925, should be paid by the employers. From that award the present appeal is brought to this Court. The learned county court judge made a short note of his decision at the time the matter was before him, and he has been good enough to expand his notes to greater length in order that this Court might be informed of the grounds on

which he acted. We are not unmindful of the fact that county court judges have heavy courts and are pressed with a number of cases that they have to determine, and the learned county court judge in this case took the course which to him seemed right, to give as much information as he could by expanding his notes at a later date. We have therefore before us the grounds upon which he acted, but we have to determine whether or not he was right in accepting the claim for arbitration and making an award for 35*s.* a week upon the materials then before him.

The employers appealed. The appeal was heard on June 24, 28, 29, 1926.

R. A. Norris for the appellants. The county court judge was wrong in ignoring the proceedings under s. 14 of the Act of 1923 and allowing the respondent to commence proceedings de novo for arbitration. The respondent's proper course would have been to proceed by way of review, but in this he would have failed, as he would have been unable to show that there had been any change in his condition since the date of the registrar's order. The present proceedings were initiated by the appellants under s. 14 of the Act to diminish the compensation and were carried through to their conclusion by both parties, and an order was made by the registrar under the section directing payment to the appellants of the money paid by them into Court. There was no appeal by the respondent to the judge against that order, and the matter was therefore concluded against him. The respondent had therefore no right to reopen the matter by commencing arbitration proceedings. To allow such proceedings to be taken would be to nullify s. 14 of the Act of 1923, the object of which was to afford a short and cheap procedure for determining questions of compensation.

Pudney v. *William France, Fenwick & Co.* (1) is distinguishable from this case. There the proceedings under s. 14 were not completed. The workman did not comply with the provisions of proviso (i.) to s. 14 by sending to the

(1) [1925] 1 K. B. 346.

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employer a report of his medical practitioner disagreeing with the certificate served on him by the employer, and it was held that the workman was not thereby precluded from subsequently proceeding to arbitration to assess the compensation payable to him.

Further, the respondent has failed to show that any new circumstances have arisen since the date of the registrar's order which would justify him in proceeding to arbitration.

The county court judge has found that the respondent is an "odd lot," but on this point, it is submitted, he has misdirected himself: see the observations of Scrutton L.J. in *Foster* v. *Wharncliffe Woodmoor Colliery Co.* (1)

W. Shakespeare for the respondent. Proceedings under s. 14 of the Act of 1923 are not arbitration proceedings at all, and the county court judge can go behind them, except to this extent, that he cannot contradict the medical referee's certificate. Under the section the registrar has no jurisdiction except over the money paid into Court by the employer. His jurisdiction is limited to deciding whether the employer is justified in reducing the compensation to the extent he has done. Under s. 1, sub-s. 3, of the Act of 1906 the quantum of compensation can only be assessed in arbitration proceedings. The provisions of that section have not been repealed. Sch. II. of the Act of 1906 contains no provision enabling the registrar to deal with compensation. It is clear from s. 1 that the person who is to settle the amount of the compensation is the arbitrator himself. The Court is now asked to say that these provisions are repealed by s. 14 of the Act of 1923. If the registrar here had said that the workman had entirely recovered that decision would bind no one. His jurisdiction is confined to the money paid into Court. The object of s. 14 was to tide over the period which elapsed between the date of the employer ceasing to pay and the date of the hearing of the arbitration, during which time the workman would be receiving no compensation. It was not intended to do away with arbitration proceedings, but to restrict the powers of employers. The fact that s. 14

(1) [1922] 2 K. B. 701, 714-716.

has been complied with does not prevent the workman having the amount of the compensation assessed.

[SCRUTTON L.J. Is not this case the converse of *Davies* v. *Glyncorrwg Colliery Co.* ? (1)

In that case it was held that the only way the question of compensation could be determined was on an application to the county court judge. It is true that in that case the parties had not followed the procedure prescribed by s. 14 in its entirety; but even if they had there is nothing to show that arbitration proceedings could not have been commenced. The words " or to an extent to which, apart from this section, he would not be entitled to do so " in proviso (iii.) to s 14 show that it was not intended that an employer should be able to deprive the workman of his right to compensation. Further, if the employer is proposing to take advantage of s. 14 he must on his part comply with all its provisions. Here the appellants did not pay the whole of the money in dispute into Court.

[*Norris* objected that that point was not raised in the county court.]

The point is whether the appellants have in fact complied with all the provisions of s. 14. Under that section the employer must continue to pay the money in dispute into Court until the registrar has given his decision as to the effect of the medical referee's report. In *Prendergast* v. *Lancaster's Steam Coal Collieries, Ld.* (2), it was held that, nothwithstanding the certificate of the medical referee that the workman had recovered, arbitration proceedings could nevertheless be commenced: see also *Crewe* v. *John Rhodes, Ld.* (3)

[He also referred to *Towler* v. *British Dye-Stuffs Corporation* (*Blackley*). (4)]

LORD HANWORTH M.R. This is an appeal from an award of the learned judge of the Nottingham County Court which raises a somewhat important question. The facts are these.

(1) [1925] 2 K. B. 339.
(2) 18 B. W. C. C. 494.
(3) (1925) 18 B. W. C. C. 303
(4) (1921) 14 B. W. C. C. 34.

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[His Lordship stated the facts as above set out and continued :] It is said on behalf of the appellants that the matter had been determined by reason of the procedure indicated by cl. (*c*) of s. 14 of the Act of 1923 having been followed to a conclusion. That argument appears to us to be right. It is to be remembered that s. 14 of the Act of 1923 was introduced with the object of providing that, except in accordance with the powers or the procedure indicated by that section, there should not be an ending or diminishing of weekly payments then in force as compensation for incapacity, total or partial. I have already said, in *Davies* v. *Glyncorrwg Colliery Co.* (1), which has been referred to : "It seems quite plain that the section was intended to prevent the sudden ending or diminishing of weekly payments made by the employer under the Acts, excepting in the three cases provided—namely, the return to work, the earning by the workman of higher wages than he was being paid for his partial incapacity, or where the employer has served a certificate and that is accepted by the workman and is not countered by a report of his own medical man. Unless you can bring the matter within those three cases, the plain words of s. 14 stand, that an employer is not entitled to end or diminish a weekly payment." At that time I was considering a case of where s. 14 had not been fully complied with, but the obvious intention was to indicate that there were three cases where there could be an ending or diminishing of the payments—namely, those which are referred to in sub-clauses (*a*) and (*b*) and (*c*), where (*c*) has been fully carried out.

Now, in the present case the procedure under cl. (*c*) has been fully carried out, and where that is the case and it has been determined by the registrar that the sum held in medio or any portion of it is not required in payment of compensation to the workman, there is a decision within the terms of s. 14 which justifies the employers in refusing to pay otherwise than in accordance with the ultimate decision of the dispute—namely, that 15s. a week is sufficient. It is

(1) [1925] 2 K. B. 339, 345.

suggested that that decision is not in accordance with some of the previous cases. There have been several in the course of the last year or two, since the Act of 1923 came to be considered. In *Prendergast* v. *Lancaster's Steam Coal Collieries, Ld.* (1), and in *Starkey* v. *Clayton & Sons* (2), we had to deal with two cases of industrial disease. One was a case of nystagmus and the other a case of dermatitis. What we had to consider there was whether there could be a fresh arbitration to determine whether, although the liability for immediate incapacity had been satisfied by payment, there was not still a special susceptibility left which prevented the workman from gaining a payment or wages equivalent to what he would have been able to earn if he had not suffered from nystagmus or from dermatitis respectively. We were dealing with that particular class of case where there is that special susceptibility to a fresh outbreak of the same disease by reason of continuing in the employment. But in *Davies* v. *Glyncorrwg Colliery Co.* (3) we were dealing with a case in which the employers had not taken the course, as they have in the present case, of paying money into Court and letting it be held in medio, and we said in that case that until there was a definite decision within s. 14, the payments would have to continue, and thus the arrears which had not been paid were still due from the employers to the workman. Equally in *Crewe* v. *John Rhodes, Ld.* (4), we held that the medical referee's certificate was conclusive and that no evidence to contradict it could be given, because finality had been reached in accordance with s. 14. We had already decided in *Pudney* v. *William France, Fenwick & Co.* (5) that arbitration proceedings are not excluded in appropriate cases. But in *Crewe* v. *John Rhodes, Ld.* (4), it would have made s. 14 of no effect if we had held that although s. 14 was carried out to its conclusion and the whole of the procedure fulfilled, yet a workman might still bring arbitration proceedings without any change of circumstances to justify a new application on

(1) 18 B. W. C. C. 494.
(2) 18 B. W. C. C. 346.
(3) [1925] 2 K. B. 339, 345.
(4) 18 B. W. C. C. 303.
(5) [1925] 1 K. B. 346.

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his part. It was decided in a number of cases which are collected in Willis on Workmen's Compensation, 23rd ed., p. 316, that under the Act of 1906, para. 16 of Sch. I., which enables the weekly payments to be reviewed at the request of either the employer or the workman and on such review to be ended, diminished or increased, cannot be put in operation after a decision has been reached unless some new circumstances have arisen. The requirement that there shall be new circumstances is not stated in the Act, but it is clearly laid down in the cases which will be found on the page in Mr. Willis' book to which I have referred. It appears to me that where s. 14 has been fully complied with and a definite decision has been reached, there is no right on the part of the workman to reopen the matter which has been concluded in accordance with the provisions of s. 14, unless and until new circumstances have arisen which justify a fresh application. By parity of reasoning, just as it was not possible to ask for a review under para. 16 of Sch. I. of the Act of 1906 unless new circumstances had arisen, so where the conclusion has been reached under s. 14 of the Act of 1923, that conclusion remains final unless and until new circumstances have arisen which will justify a fresh application. In *Pudney's* case (1) we did not say that s. 14 was not to have a final and conclusive effect, but what we did say was that where it has not been complied with or not followed out to its conclusion, the workman is not deprived of his right to claim arbitration. But it still remains for us to say in these cases that where from the facts a definite decision has been reached, there cannot be a fresh application for an award unless and until new circumstances have arisen such as will justify an application under para. 16 of Sch. I. of the Act of 1906. I adhere to what I said in *Prendergast's* case (2), that where there is something which is fresh, such as in the case of special susceptibility to an industrial disease or new circumstances, there an application can be made; but until such circumstances are shown, the authority of the certificate which has been obtained and the purport of which has been

(1) [1925] 1 K. B. 346. (2) 18 B. W. C. C. 494, 504.

declared by the order of the registrar, cannot be cut away or diminished; and in *Crewe* v. *John Rhodes, Ld.* (1), I said: "The county court judge therefore appears to me to have mistaken the duty which falls upon him when that certificate was produced. He had to treat that as conclusive of the matters which were certified within it," and inasmuch as it is conclusive and no new circumstances have arisen, there is no right in the workman before new circumstances have arisen to set aside the whole effect of the procedure under s. 14 by making an application for a fresh arbitration.

It appears to me that in the present case the county court judge has not given full weight and effect to the conclusion which was reached by the carrying out on the part of the workman and the employers of the full aim of the procedure under cl. (*c*) of s. 14, and that he ought to have given effect to that conclusion, and if he had done so he would have said: "There are before me at the present time no new circumstances which justify a fresh arbitration." On those grounds it appears to me that the learned county court judge came to a wrong decision.

Mr. Shakespeare has pointed out that there is still another proceeding which will come before the county court judge for decision. That in turn may come before us, but in the present case we are deciding that the conclusion reached under s. 14 stands good unless and until new circumstances have arisen which would justify an independent application for arbitration. For these reasons the appeal will be allowed, the award made by the learned county court judge will be set aside, and an award made in favour of the employers.

SCRUTTON L.J. This appeal raises a somewhat important question as to the procedure under s. 14 of the Act of 1923, a section which has given the Court a good deal of trouble in the past and which I am afraid it cannot hope to be entirely free from in the future. It is important to state quite clearly what we are deciding in this case and what the facts are which raise the question for decision.

(1) 18 B. W. C. C. 303, 312.

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The workman in December, 1917, suffered an injury which produced hernia in the navel, and from 1917 to 1925, some eight years, he was paid compensation of 35*s.* a week for total incapacity. In December, 1925, the employers were of opinion that his incapacity was not total but partial, and they accordingly endeavoured to carry out the procedure under s. 14 for diminishing the compensation that they were paying. They gave notice that they would reduce the 35*s.* a week to 15*s.* a week, ten days from the date of the notice, and served with the notice their own doctor's certificate as to the incapacity of the workman, which was to the effect that 80 per cent. of it was due to old age—he was, as a matter of fact, seventy years of age—and 20 per cent. of it due to hernia. The workman also carried out the procedure under s. 14, and replied with another doctor's certificate that he was totally incapacitated. Thereupon both parties agreed to go to the medical referee. The employers, still carrying out the procedure under s. 14, paid into Court the sum of 2*l.* which appears to be the difference between the total incapacity payment of 35*s.* a week and the partial incapacity payment which they were prepared to make of 15*s.* a week, for the period of two weeks, which is the period between the date when they stated that would reduce the payment, and the date when the medical referee made the certificate—roughly two weeks. The medical referee then made his certificate, which my Lord has read, that the workman was seventy years of age, that the hernia was not serious, but caused him some slight pain if he attempted to do hard work, that at his age, together with his condition, he was only fit for some light work, lamp cabin or similar work, and that he was quite fit for this kind of work and "able to walk a reasonable distance (two miles) to his work. The incapacity (for full work) of the said James Rhodes is due to his accident eight years ago." The employers treated that as a certificate involving the consequence that they were right in reducing the compensation from 35*s.* to 15*s.* a week, and, still following the procedure under s. 14, they then applied to the registrar to have the 2*l.* paid out to them. The registrar decided that they were

entitled to have the 2*l.* paid out to them. The section gives a right of appeal to the judge from the registrar's decision, but the workman did not appeal. Then, placing his affairs in the hands of very distinguished counsel, two methods of procedure were initiated by the workman: first of all, a method which entirely ignored the procedure before the registrar and which asked for an arbitration in which it was going to be contended that the workman was not bound in any way by what happened before the registrar, though he had not appealed against his decision; secondly a method of attack which did treat the proceedings as valid and asked for a review. The county court judge took the view that he had jurisdiction to ignore the proceedings before the registrar, and made an award ordering the employers to pay full compensation for total incapacity from the date when the employers had originally stopped payment, which, of course, involved the consequence that the sums which the registrar had ordered to be paid back to the employers because they were not liable to pay them, were then ordered by the county court judge to be paid back to the workman because the employers were liable to pay them.

The question now before the Court is whether the county court judge was right in thinking that he had jurisdiction to enter into an arbitration which would date back to the day when the employers, following the procedure of s. 14, after giving notice, had stopped paying total compensation and proceeded to the medical referee. Now, s. 14, as I have understood it (I am not sure I have understood it), was introduced for two reasons. First of all, because at that time the employer, if he thought the workman had recovered, stopped compensation, and there was a gap in the workman's life during which he had to go through the wilderness of legal proceedings until at last he obtained an award which decided whether the employer was right or wrong in stopping the compensation, and it was desired to avoid that stoppage of compensation to the workman unless in certain circumstances the employers showed that the compensation ought to be stopped. I think the second reason was that there was not

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such enthusiasm on the part of those who framed this clause about procedure by lawyers for lawyers, as there was in the legal profession itself, and that an attempt was made to see whether a shorter and cheaper and more satisfactory procedure could not be obtained through doctors, and a means was adopted of allowing the employer to put forward his doctor's certificate, the workman to reply with his doctor's certificate, and, if they disagreed, which Parliament contemplated was possible, of allowing them to go to a third doctor, who would be an unfailing source of truth. Parliament did get so far as to contemplate that it might not be clear what the third doctor's certificate meant, and in that case they did not propose going in the first instance to the judge, but they took the shorter cut of going to the registrar, with an appeal to the judge. The result of the section carrying out that idea was that the employer was not entitled to end or diminish the weekly payment unless one of seven things happened. My Lord says it is three; but it is a great deal more than three. The employer could end the weekly payments: (1.) if there was an agreement; (2.) if there was an arbitration; (3.) if the workman in receipt of a weekly payment in respect of total incapacity had actually returned to work; (4.) if the weekly earnings of the workman which were being paid for partial incapacity had actually been increased from what he was earning before; (5.) if the employer served on the workman his doctor's certificate and the workman did nothing; (6.) if, having served his medical certificate, the workman served a medical certificate and the employer accepted it and ended or determined in accordance with that certificate; and (7.) if the difference between the medical certificates went to a medical referee and was ended either in accordance with the certificate of the medical referee, or, if there was a dispute as to what the medical referee meant by his certificate, according to the view of the registrar as to its meaning, with an appeal to the judge in case either party was dissatisfied with the registrar's decision. So that the employer, in order to end or diminish the weekly payment, had to show one of those seven things. It is with regard to the last of those seven things that this

case arises, for here there was a doctor's certificate for the employer, a disputing doctor's certificate for the workman, a reference by both parties to the medical referee, a certificate by the medical referee, as to the meaning of which the parties disagreed, and which the registrar determined in favour of the employers. Now a medical referee is required by the order to certify as to the work for which the workman is fit, which appears to involve an assumption that the medical referee knows something about the conditions of labour as well as those of the human body. I am quite sure that if one went to any medical referee and put to him the question whether a workman was fit to labour in some particular trade, naming it, he would answer: "I have not the least idea; tell me what kind of trade it is." It is assumed, somehow, that the medical referee is able to certify as to the employment for which the workman is fit. The way in which the registrar comes in is when the employer, having got the medical referee's certificate and having complied with the section by paying money into Court to await the decision, comes and says: "Now give me my money back, because the medical referee has certified in my favour." It seems to me quite clear that in a case of partial incapacity the medical referee's certificate may not by itself decide the matter. The medical referee may say: "I certify that the workman has recovered to a certain extent." That certification has to be turned into money in order to see whether the employer was justified in diminishing the compensation to the extent he did—whether he ought to have paid more into Court, whether he had made a mistake as to the amount of compensation. It seems to me quite clear that when Parliament gives to the registrar, or, on appeal, to the judge, power to determine in money what the certificate means, they assume in some way or other the registrar and the judge will have knowledge or evidence before them as to the amount of wages in the employment for which the referee finds the workman is fitted. They must exercise a judicial function on materials in addition to the medical referee's certificate. For instance, in this case, as a matter of fact, the registrar

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has found that the 15*s.* to be paid to the workman is right and that the 20*s.* which the employers paid into Court ought to go back to them. But it might be that the employers, though they are right in finding that there was a recovery from total incapacity, had miscalculated the compensation for partial incapacity and had paid into Court 20*s.*, when they ought to have paid in 25*s.*, or something like that. It seems to me that is the function which Parliament has put upon the registrar, and upon the judge on appeal from him. It is impossible to say that once that function has been judicially exercised and a decision has been come to, it is open to either of the parties to ignore that decision and start the whole matter over again. It has been decided between the parties that the proper amount is so much. You cannot reopen the matter and go back to the period covered by the sum which the employers paid into Court and say, as suggested by Mr. Shakespeare in this case, that though the registrar has ordered the whole sum to be paid back to the employers, yet the judge can say: "Now hand back to the workman the sum which the registrar has ordered to be paid out of Court to him." The two things are quite inconsistent. Therefore, it seems to me that on that ground the county court judge must be wrong in thinking that he has jurisdiction to decide a question which has been already decided between the parties by the registrar, and in which the parties have failed to exercise their right of appeal to the judge. That is enough to determine this case.

I understand that the workman is going back to the county court judge to say: "Yes, treat the matter as final up to January 14, 1926, the date of the registrar's order, now I claim a review in respect of the period since." I will say nothing about that proceeding, as we may meet with it again I desire however to say this that the question of "odd lot" has not been argued before us, but I hope, before the county court judge deals with an application for a review on the basis of the workman being an "odd lot," he will very carefully read *Cardiff Corporation* v. *Hall* (1) as explained in the two

(1) [1911] 1 K. B. 1009.

subsequent cases, because in *Cardiff Corporation* v. *Hall* (1) the workman had lost one hand, he was a one-handed man, and obviously a large number of spheres of labour were closed to him; and he was expressly held by the Court of Appeal not to be an "odd lot," and a very careful definition was framed in the very rare cases in which the words "odd lot" apply. Before the county court judge again embarks upon the troubled sea of "odd lot," I hope he will carefully consider the extent to which that very unfortunate phrase has been limited by the decisions of the Court of Appeal.

I agree that in this particular case the award of the county court judge must be set aside, with the usual consequences.

RUSSELL J. I agree.

Appeal allowed.

Solicitors for appellants: *Peacock & Goddard, for Elliot Smith & Co., Mansfield.*

Solicitors for respondent: *Taylor, Jelf & Co., for E. S. Buxton Hopkin, Sutton-in-Ashfield.*

W. I. C.

COHEN *v.* ROCHE.

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June 9, 10, 24.

Sale of Goods—Note or Memorandum—Signature of Seller—Sale by Auction—Catalogue—Printed Name of Auctioneer—Authentication—Enforceable Contract—Action—Remedy—Delivery Up of Goods or Damages—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 4, 52.

The defendant, an auctioneer, circulated a printed catalogue on the front page of which it was stated that he, therein described by name, would sell on a specified date certain lots of furniture; the other pages set forth the lots to be sold. At the sale the defendant had before him an auctioneer's book consisting of large sheets of paper, each of which had pasted upon it a leaf from the printed catalogue and on each side of the leaf a space for notes. The defendant's name was nowhere written by him in this book. One of the lots, comprising certain chairs of no unusual value, which were the property of the defendant himself, was knocked down to the plaintiff for 60*l*. The defendant then wrote in his book against that lot the price at which it had been sold and the name of the plaintiff as purchaser. To an action by the plaintiff against the defendant for delivery up of the

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chairs and alternatively damages for alleged breach of contract, the defendant pleaded that s. 4 of the Sale of Goods Act, 1893, had not been complied with:—

Held, that there was within the section a note or memorandum in writing of the contract duly signed by the defendant and otherwise sufficient, and an enforceable contract between the parties.

Saunderson v. *Jackson* (1800) 2 Bos. & P. 238 and *Schneider* v. *Norris* (1814) 2 M. & S. 286 principle applied.

Dyas v. *Stafford* (1881) 7 L. R. Ir. 590 followed.

Vandenbergh v. *Spooner* (1866) L. R. 1 Ex. 316 doubted.

Dewar v. *Mintoft* [1912] 2 K. B. 373 not followed.

Newell v. *Radford* (1867) L. R. 3 C. P. 52 and *Reynolds* v. *Hooper* (1902) 19 Times L. R. 33 followed.

Held, however, that the case was not one in which the Court ought, in the exercise of its discretionary power, to order specific performance of the contract and delivery up of the chairs, but that the judgment should be limited to damages for breach of contract.

To an action by the purchaser of goods sold by auction for the delivery up of the goods, the fact that the sale was a "knock out" does not of itself afford a defence.

Rawlings v. *General Trading Co.* [1921] 1 K. B. 635 followed.

ACTION tried by McCardie J. without a jury.

The following statement of the facts is taken substantially from the judgment of the learned judge:—

The plaintiff, Mr. Frederick Cohen, who traded in the name of Fredericks, was a dealer in antique furniture. The defendant, Mr. G. W. Roche, who traded as Roche & Roche, was an auctioneer at Fulham, where his premises were known as the South Kensington Auction Gallery.

On December 18, 1925, the defendant held an auction sale of modern and antique furniture. Before the sale the defendant had circulated a printed catalogue in the usual way. On the front page of the catalogue there was the following statement: "The South Kensington Auction Gallery, 147A Fulham Road, S.W. 3. . . . . Messrs. Roche & Roche (G. W. Roche, F.A.L.P.A., Proprietor) will sell at the above gallery on Friday, December 18th, 1925, at 2 o'clock, 300 lots of antique and modern furniture, including — . . . . ," and the other pages of the catalogue set forth the lots to be sold. Amongst the lots in the catalogue was this: "145. Set of 8 genuine Hepplewhite chairs, comprising 2 elbow chairs and 6 standard ditto, with carved back and splat

and reeded legs." That lot was the defendant's own property. The defendant personally conducted the sale. When selling he had in front of him an auctioneer's book of the usual kind, consisting of large sheets of paper, on every page of which was pasted a leaf from the printed catalogue; these leaves comprised the whole of the catalogue with the front page. On each side of each sheet there was a space with ruled columns for holding the autioneer's notes on the one side and, if necessary, the entry of the price and purchaser of each lot on the other side. The name of the defendant was nowhere written by him into this book. Lot 145 was duly put up for sale. There was some slight bidding by the plaintiff and another dealer, and ultimately the lot was knocked down to the plaintiff for 60*l.* in his trade name of Fredericks. Thereupon the defendant himself wrote on the right hand side of the sheet against that lot the price of 60*l.* as the figure at which it was sold and the word "Fredericks," the trade name of the plaintiff, as showing that the plaintiff was the purchaser of the lot. On the left hand side of the sheet was written "G.W.R. Re Walworth." After the plaintiff had made his purchase he left the room.

The next day the plaintiff sent his carman to the defendant's office with a cheque for 60*l.* in order to fetch the chairs away. The carman offered the cheque, but the defendant's representative would not take it, and said that the defendant must be seen personally by the plaintiff before the lot could be delivered. The carman returned with the cheque to the plaintiff. Two days later the plaintiff interviewed the defendant and asked him whether he would deliver the goods. The defendant said that he refused to hand over the chairs because lot 145 had been the subject of a "knock out" to which the plaintiff had been a party.

On January 5, 1926, the plaintiff brought the present action against the defendant. In his statement of claim the plaintiff stated (para. 4) that the defendant had refused to deliver the said chairs to the plaintiff and had detained and still detained and/or had converted the same, and that the refusal was made verbally to the plaintiff's carman at the

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auction rooms on December 19, 1925, and to the plaintiff on December 21, 1925; (para. 5) that by reason of the premises the plaintiff had lost the profit which he would have made on the resale of the chairs and was put to expense in sending a carman to collect the same: and the plaintiff claimed (*a*) delivery up of the said chairs, or payment of their value, (*b*) damages.

The defendant in his defence stated that the contract sued on (if any, which was not admitted) was a contract for the sale of goods of the value of 10*l.* or upwards and the requirements of s. 4 of the Sale of Goods Act, 1893, in respect of such contract were not complied with, and the said contract was therefore not enforceable by action.

On June 9, 10 and 24 the action was tried by McCardie J. without a jury.

The learned judge allowed the plaintiff to amend his action and statement of claim by adding a claim for damages for breach of contract.

Evidence was given by and on behalf of both parties. The plaintiff gave evidence with a view to showing that the sale of lot 145 was not a knock out. The defendant gave evidence that the words in the auctioneer's book on the left hand side of the sheet opposite that lot indicated that the goods were his own property and had been purchased by him from the estate of one Walworth; and he also gave evidence to show that the sale of that lot was a knock out.

Done for the plaintiff.

Lionel Jellinek (*E. F. Lever* with him) for the defendant.

[The arguments of counsel and the authorities cited are fully set forth in the judgment of the learned judge.]

June 24. McCARDIE J. This action raises points of practical importance to those who buy and sell at auctions. The main preliminary facts can be briefly stated. [His Lordship stated the facts substantially as above set out and continued as follows:] When the plaintiff interviewed the defendant and asked him whether he would deliver the

chairs the defendant said that he refused to do so because lot 145 had been the subject of what is known as a "knock out" to which the plaintiff had been a party. Upon this question of "knock out" conflicting evidence was given as to what happened at the sale and as to what took place between the plaintiff and the defendant at their interview. I accept the evidence of the defendant. I hold that there was in fact a "knock out" with respect to lot 145, and that but for the "knock out" the lot would have realized a higher price. I deal with this question in fairness to the defendant. I am satisfied that he only raised the technical point as to s. 4 of the Sale of Goods Act, 1893, because he desired to express publicly and clearly his condemnation of the unfair and injurious system of "knock out" which is far too prevalent in many parts of the country. But, although I find in the defendant's favour on this point of fact, yet it seems to be reasonably clear in law that the existence of a "knock out" does not of itself afford any answer to this action by the plaintiff: see *Rawlings* v. *General Trading Co.* (1)

I now turn to the first and leading point of law in the case. The defendant pleads that the contract made at the auction sale with respect to lot 145 is not enforceable on the ground that s. 4 of the Sale of Goods Act, 1893, has not been complied with. Much learning surrounds the contention. Sect. 4 provides as follows: "A contract for the sale of any goods of the value of 10*l.* or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf." In substance, s. 4 of the Act of 1893 reproduces s. 17 of the Statute of Frauds, 1677 (29 Car. 2, c. 3): see the notes in Chalmers' Sale of Goods Act, 10th ed., p. 23. The question is whether here there is a note or memorandum in writing of the contract signed by the defendant, so that

(1) [1921] 1 K. B. 635. C. A., Scrutton L.J. dissenting.

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he can be charged with liability. The defendant submits that there has not been a compliance with the section. He takes two points—namely, (*a*) that there is no signature by him, and (*b*) that, even if there be a signature, yet that there is no memorandum of the terms of the contract made. The submissions of the defendant are of legal interest. The method of recording sales adopted by the defendant is the one usually followed by auctioneers throughout the country when conducting sales of goods. If the defendant's submissions be sound, then buyers at auctions will but rarely possess any enforceable rights in respect of their purchases. The nature of an auction sale is indicated by s. 58 of the Sale of Goods Act, 1893. By virtue of that section, lot 145 was here the subject of a separate contract of sale.

Before dealing with the defendant's points and the relevant decisions, I think it is necessary to bear in mind the facts relating to the catalogue pasted into the defendant's sale book in the way I have described. The name of the defendant was nowhere written by him into his auctioneer's book. The plaintiff relies on the printed name of the defendant appearing on the front page of the catalogue. The relevant part of that page, which was pasted into the defendant's sale book, is as follows: "The South Kensington Auction Gallery, 147A Fulham Road, S.W. 3. . . . . Messrs. Roche & Roche (G. W. Roche, F.A.L.P.A., Proprietor) will sell at the above Gallery on Friday, December 18th, 1925, at 2 o'clock 300 lots of antique and modern furniture, including" and so on. The printed words (Roche & Roche, G. W. Roche, F.A.L.P.A., Proprietor) are relied on by the plaintiff as constituting a signature by the defendant within s. 4. The Statute of Frauds and s. 4 of the Sale of Goods Act, 1893, have been prolific of decisions, and the points now before me require an examination of the cases.

After consideration, I have reached the conclusion that the plaintiff is right in his contention. In *Saunderson* v. *Jackson* (1) the headnote, which seems correctly to express

(1) 2 Bos. & P. 238; 5 R. R. 580.

the views of Lord Eldon C.J., says: "A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within the Statute of Frauds." That view of Lord Eldon was confirmed in *Schneider* v. *Norris* (1) before Lord Ellenborough C.J. and Le Blanc, Bayley, and Dampier JJ. There the bill of parcels contained no written signature by the defendant Norris. All that could be described as a signature was the defendant's name printed in the bill of parcels. The defendant only wrote the name of the plaintiff in that bill of parcels. Lord Ellenborough said: "Here there is a signing by the party to be charged by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance, as if he had written 'Norris & Co.' with his own hand." The other members of the Court took the same view. The two decisions I have cited are to-day recognized authorities, and it must be taken as settled law that a signature may be printed and that it need not appear at the foot of the document. The insertion of the name in any part of the writing so as to authenticate the instrument is sufficient: see *Johnson* v. *Dodgson* (2) and Leake on Contracts, 7th ed., p. 189. The matter is, I think, well put in Addison on Contracts, 11th ed., p. 41, as follows: "If the party has recognised and adopted his printed name or signature—for instance, by sanctioning or permitting the distribution of printed hand bills, or printed particulars of sale, in which his name appears—there has been a signature by an agent duly authorised, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it." The ratio of *Schneider* v. *Norris* (3) was applied by Denman and Cave JJ. in *Evans* v. *Hoare* (4), and the contention of the plaintiff here is also supported by *Durrell* v.

(1) (1814) 2 M. & S. 286, 289.
(2) (1837) 2 M. & W. 653.
(3) 2 M. & S. 286.
(4) [1892] 1 Q. B. 593.

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Evans. (1) The facts in the case of *Hubert* v. *Treherne* (2) were of a special character. I think that the decisions cover the present case in favour of the plaintiff. It is, of course, clear that a printed name in the body of an instrument, in order to operate as a signature, must be authenticated by the person to be charged: see per Buckley J. in *Hucklesby* v. *Hook.* (3) In the case now before me there was ample authentication in that the defendant himself wrote down in his auctioneer's book the price realized by lot 145, and also entered the names of the purchasers. He thus recognized the bargain and his own printed signature. It is singular that there is no direct English authority on the point I have dealt with. In an Irish case, however, the matter now before me came before Chatterton V.-C. I refer to *Dyas* v. *Stafford.* (4) I need not set out the facts of that case, which related to a sale of land and premises in Dublin. Suffice it to say that the learned Vice-Chancellor, after reviewing the English decisions (including *Schneider* v. *Norris* (5)), ruled that the printed name of the auctioneer appearing in the printed indorsement of the particulars and conditions of sale constituted a sufficient signature within the Statute of Frauds: see also Hart on the Law of Auctioneers, 2nd ed., pp. 166 et seq.

For the reasons given I therefore hold that there was here a signature by the defendant within s. 4 of the Sale of Goods Act, 1893.

The next point (somewhat interwoven with the first point) is whether or not there was a sufficient memorandum of the terms of contract so as to comply with s. 4 of the Sale of Goods Act, 1893. The requirements of the section are neatly set out in Chalmers on the Sale of Goods Act, 1893, 10th ed., p. 25, where it is said (citing the decisions): "The note or memorandum must designate the parties by name or description, the goods sold, the price if agreed on, and must show directly or by implication the nature of the

(1) (1862) 1 H. & C. 174.
(2) (1842) 3 Man. & G. 743.
(3) (1900) 82 L. T. 117.
(4) 7 L. R. Ir. 590.
(5) 2 M. & S. 286.

promise of the party to be charged." The defendant here contends that the parties to the contract are not sufficiently shown, in that (as he argues) the buyer of lot 145 is not given with sufficient clearness. The entry in the defendant's book is " G.W.R. Re Walworth. 145. Set of 8 genuine Hepplewhite chairs comprising 2 elbow chairs and 6 standard ditto with carved backs, splat and reeded legs. 60*l*. Fredericks." Now it is plain that the plaintiff's name was here written down by the defendant with the authority of the plaintiff. In *Emmerson* v. *Heelis* (1) Mansfield C.J. said of the auctioneer's agency for the purchaser : " By what authority does he write down the purchaser's name ? By the authority of the purchaser. These persons bid, and announce their biddings, loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this ? That he may write down their names opposite to the lots ; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser " : see too per Blackburn J. in *Peirce* v. *Corf.* (2) In the present case the notes on the left-hand side of the sheet (" G.W.R. Re Walworth ") indicated, as the defendant stated, that the goods were his own and had been purchased by him from the estate of one Walworth. In spite of the ingenious suggestions of the defendant's counsel no one can, I think, doubt that the word " Fredericks " on the right-hand side of the sheet indicates the plaintiff as the buyer of lot 145. It can indicate nothing else. Above it and below it are the names of the buyers of other lots. Thus it is clear that the plaintiff's name was, with his authority, written down by the defendant against lot 145 as the purchaser of it. The defendant cited *Vandenbergh* v. *Spooner.* (3) It may be doubted whether that case was correctly decided. If the ruling there given was sound it must rest on the footing that the memorandum then in question, although it contained the plaintiff's name, yet mentioned it only as part of the description of the goods, without naming the plaintiff as a party to the bargain : see Benjamin on Sale, 6th ed., p. 285.

(1) (1809) 2 Taunt. 38, 48. (2) (1874) L. R. 9 Q. B. 210, 214.
(3) L. R. 1 Ex. 316.

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Vandenbergh v. *Spooner* (1) should always be read in conjunction with *Newell* v. *Radford* (2) hereafter mentioned. In the case now before me, as I have said, no one can doubt that " Fredericks " was written down as the name of the buyer. To hold otherwise would invalidate innumerable contracts made at auction sales. The defendant also cited *Dewar* v. *Mintoft*. (3) With the greatest respect to the learned judge who tried that case I feel unable to follow his decision so far as it touches the point now before me. In my view it is reasonably clear that the name of the buyer (" Mintoft ") was there shown as purchaser. I do not think that *Dewar* v. *Mintoft* (3) accords with the principle on which other cases under the Statute of Frauds and the Sale of Goods Act, 1893, have been decided. Nor does it accord with the view expressed in Sugden on Vendors and Purchasers, 14th ed., p. 144. In any event, the circumstances in *Dewar* v. *Mintoft* (3) were exceptional and afford no real guidance to other sets of facts. It was not the case of an auctioneer's ordinary sale book. It may also perhaps be said that the word " Mintoft " appeared in a place where few would expect to see the name of a buyer. I prefer to follow the case of *Newell* v. *Radford* (2), already cited, where the decision was given by Bovill C.J. and Willes, Byles, and Keating JJ., and in which doubts were expressed as to the ruling delivered in *Vandenbergh* v. *Spooner*. (1) I respectfully agree also with the decision of Darling J. in *Reynolds* v. *Hooper*. (4) There two stacks of straw, each above the value of 10*l*., were sold by auction in separate lots to the same purchaser. The auctioneer wrote (inter alia) the name of the purchaser (Hooper) in the sale catalogue against the printed description of the first stack sold, but against that of the second stack (which immediately followed the first) he wrote the word " Ditto " or " Do." It was held expressly by Darling J. that this was a sufficient signature of the second contract to satisfy s. 4 of the Sale of Goods Act, 1893, and it was held also, by implication, that the name of the defendant as buyer sufficiently appeared.

(1) L. R. 1 Ex. 316.
(2) L. R. 3 C. P. 52.
(3) [1912] 2 K. B. 373.
(4) 19 Times L. R. 33.

For the reasons given I am of opinion that there is in the case now before me a sufficient and duly signed memorandum within s. 4 of the Sale of Goods Act, 1893, and that an enforceable contract exists between the parties.

I now take the final point in the case. The plaintiff sued in detinue only. The writ and statement of claim contain no alternative demand for damages for breach of contract. They ask (*a*) for delivery up of the chairs or payment of their value, and (*b*) damages for detention. I have however allowed an amendment whereby the statement of claim asks damages for breach of contract. The plaintiff vigorously contends that he is entitled as of right, once a binding contract is established, to an order for the actual delivery of the chairs, and that he is not limited to damages for breach of bargain. This point raises a question of principle and practice. Here I may again state one or two of the facts. The Hepplewhite chairs in lot 145 possessed no special features at all. They were ordinary Hepplewhite furniture. The plaintiff bought them in the ordinary way of his trade for the purpose of ordinary resale at a profit. He had no special customer in view. The lot was to become a part of his usual trade stock.

The form of order in detinue cases for the delivery of goods is, in substance, this: "It is this day adjudged that the plaintiff do have a return of the chattels in the statement of claim mentioned and described (here set out description) or recover against the defendant their value (here set out value) . . . . and damages for their detention": see the observations of Rowlatt J. in *Bailey* v. *Gill.* (1) By Order XLVIII., r. 1, however, the Court has power to direct that execution shall issue for the delivery of the goods, without giving to the defendant the option to retain the property upon payment of the assessed value. Now in the case before me, the plaintiff desires to secure a warrant for the compulsory and specific delivery of the chairs to him: see Benjamin on Sale, 6th ed., p. 1121 (n.). I do not doubt that upon the purchase of the specific items in lot 145 the plaintiff gained the property in

(1) [1919] 1 K. B. 41, 42.

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such items: see *Tarling* v. *Baxter* (1) and s. 18 of the Sale of Goods Act, 1893. Prima facie, therefore, he would be entitled to possession on payment or tender of the price. Here the plaintiff was willing to pay the price, and it seems clear that the defendant waived a formal legal tender. The defendant did not object to the cheque as a cheque, inasmuch as the plaintiff's credit was perfectly good: see *Polglass* v. *Oliver* (2), and *Jones* v. *Arthur* (3), and Roscoe's Nisi Prius, 19th ed., p. 594. Tender divests lien (see *Martindale* v. *Smith* (4)), and I will assume that waiver of tender will produce the same result as actual tender in divesting a defendant of his right to assert a vendor's lien: see the cases at pp. 886–889 of Benjamin on Sale, 6th ed. It therefore follows that the plaintiff here was entitled to launch his action of detinue: see Benjamin on Sale, 6th ed., pp. 1120 and 1081.

But at this point there arise other considerations. In *Chinery* v. *Viall* (5) it was laid down that as between buyer and seller the buyer cannot recover larger damages by suing in tort instead of contract: see too Benjamin on Sale, 6th ed., p. 1080 (z). Bearing *Chinery* v. *Viall* (5) in mind, it is necessary next to mention s. 52 of the Sale of Goods Act, 1893, which provides that in any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, direct by its judgment that the contract shall be performed specifically without giving the defendant the option of retaining the goods on payment of damages. It has been held that s. 52 applies to all cases where the goods are ascertained, whether the property therein has passed to the buyer or not: see per Parker J. in *Jones* v. *Earl of Tankerville* (6) It seems clear that the discretionary provisions of s. 52 cannot be consistent with an absolute right of a plaintiff to an order for compulsory delivery under a detinue judgment in such a case as the present. How, then, does the law stand as to detinue? In my view the power of the Court in an action of detinue

(1) (1827) 6 B. & C. 360.
(2) (1831) 2 Cr. & J. 15.
(3) (1840) 8 Dowl. P. C. 442.
(4) (1841) 1 Q. B. 389.
(5) (1860) 5 H. & N. 288.
(6) [1909] 2 Ch. 440, 445.

rests upon a footing which fully accords with s. 52 of the Sale of Goods Act, 1893. In *Whiteley, Ld.* v. *Hilt* (1) (an action of detinue) Swinfen Eady M.R. said: "The power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate. In equity, where a plaintiff alleged and proved the money value of the chattel, it was not the practice of the Court to order its specific delivery: see *Dowling* v. *Betjemann.*" (2) The law is thus, I am glad to find, consistent in its several parts. In the present case the goods in question were ordinary articles of commerce and of no special value or interest, and no grounds exist for any special order for delivery. The judgment should be limited to damages for breach of contract. The plaintiff in his evidence said that the chairs were worth from 70*l.* to 80*l.* With this I agree. I assess the damages at the sum of 15*l.*

For the reasons given I therefore enter judgment for the plaintiff for 15*l.* damages for breach of contract with costs on scale "C" of county court costs.

Judgment accordingly.

Solicitors for plaintiff: *Parfitt, Cresswell & Williams.*
Solicitor for defendant: *H. C. L. Hanne.*

J. R.

(1) [1918] 2 K. B. 808, 819. (2) (1862) 2 J. & H. 544.

C. A.
1926
July 9, 12, 13.

[IN THE COURT OF APPEAL.]

ELLIOTT (INSPECTOR OF TAXES) *v.* DUCHESS MILL, LIMITED.

Revenue—Income Tax—Company—Succession to Business of former Company—Cotton Trade—Diminution of Profits due to extraordinary Depression of Trade—Specific Cause—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 11.

By r. 11 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918: "If within the year of assessment or the period of average upon which the assessment is to be based . . . . any person succeeds to a trade . . . . the tax payable in respect of . . . . the person so succeeding shall be computed according to the profits or gains of the trade . . . . during the respective periods prescribed by this Act, notwithstanding the . . . . succession, unless the . . . . person succeeding to the trade . . . . prove to the satisfaction of the Commissioners that the profits or gains have fallen or will fall short from some specific cause, to be alleged to them, since such change or succession took place, or by reason thereof."

A company was incorporated in January, 1920, to take over the assets and business of a former cotton spinning company. The old company had been very prosperous, its profits for the years 1912 to 1917 inclusive having averaged nearly 7000*l.* a year. For the three years 1918 to 1920 inclusive the average was about 22,000*l.* The undertaking of the new company proved unsuccessful, and for the year ending February 26, 1921, it made a loss of 11,268*l.* The company having been assessed to income tax in respect of that year in the sum of 16,459*l.* (being 22,000*l.* the average of the preceding three years less 6000*l.* depreciation) appealed, and contended that it was entitled to relief under the above r. 11. It appeared that in the latter half of 1919 and the first half of 1920 there was an extraordinary boom in the cotton trade and in trade generally in the United Kingdom, but this was followed, as the Commissioners found, by a depression in the cotton trade since January, 1920, which was extraordinary and abnormal, and did not arise merely from the ordinary fluctuations in business the Commissioners further found that the profits and gains of the company's business had fallen short since that date from some specific cause (the depression) within the meaning of r. 11. On appeal this decision was upheld by Rowlatt J.

On appeal:—

Held, that the findings of the Commissioners justified them in giving the special relief provided by r. 11, inasmuch as the company had fulfilled the requirements of both limbs of the rule—namely, it had shown that it had succeeded to a business previously carried on, and had established by evidence, which was accepted by the Commissioners, that the depression was abnormal.

Held, also, following the view expressed by Grove J. in *Ryhope Coal Co.* v. *Foyer* (1881) 7 Q. B. D. 485, 496, that an ordinary fluctuation in trade is not a "specific cause" within the meaning of r. 11, but that an abnormal and extraordinary depression if accepted and so found by the Commissioners may be so.

Per Scrutton L.J.: "Specific cause" in r. 11 in itself means a precisely stated definite cause as distinguished from a mere statement "I have lost profits, because I have made less money," or words to that effect.

Miller v. *Farie* (1878) 6 R. 270 and *Ryhope Coal Co.* v. *Foyer* 7 Q. B. D. 485 followed.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. on a case stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for General Purposes of the Income Tax Acts for the Middleton Division of the county of Lancaster.

1. At a meeting of the above Commissioners held at Oldham on February 12, 1923, the Duchess Mill, Ld. (hereinafter called "the respondent company"), appealed against an assessment of 22,475*l.* less depreciation (6016*l.*), 16,459*l.*, under Sch. D of the Income Tax Act, 1918, for the year ending April 5, 1921, in respect of the business of cotton spinners carried on by them at Shaw near Oldham.

2. The respondent company was incorporated on January 14, 1920, and was formed to take over the assets and undertaking of the Duchess Spinning Co., Ld. (hereinafter called "the old company"), on the basis of the purchase of the shares of the old company at the price of 13*l.* for a 5*l.* share, and it took over as from January 22, 1920. Only about 5 per cent. of the shareholders of the old company took up shares in the respondent company.

3. The respondent company continued to carry on the business so acquired, and for the year ending February 26, 1921, sustained a loss amounting to 11,268*l.*, as computed for income tax purposes.

4. It was not disputed that the respondent company had succeeded to the business of the old company within the meaning of r. 11 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, and the only question for the decision of the Commissioners was whether the respondent company could prove to the satisfaction of the

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Commissioners that the profits or gains had fallen short from some specific cause since the succession took place or by reason thereof.

5. In the latter part of the calendar year 1919 and the first half of the following calendar year there was an extraordinary boom in the cotton trade and many cotton mills in the industrial towns in Lancashire changed hands at very increased prices, representing from three to ten times the amount of their paid up capital. Such boom was not confined to the cotton trade, but occurred generally throughout the United Kingdom and elsewhere.

6. This boom was followed by a severe and exceptional depression, which commenced in the latter half of the year 1920 and was still continuing at the date of the hearing by the Commissioners. It was not confined to the cotton trade, but occurred generally throughout the United Kingdom and elsewhere.

7. The cotton trade was one which was peculiarly liable to periods of boom, which were usually followed by periods of depression. The bigger the boom the bigger was the resulting depression. After a European war there had usually occurred a boom in the cotton trade followed by a period of depression.

8. The yarn spun by the respondent company was produced mainly from American cotton, and the market price of American spot cotton at various relevant dates during the year in question was as follows :—

February, 1920 . . .	31·16*d.*
June, 1920	27*d.*
September, 1920 . . .	20*d.*
December, 1920 . . .	9*d.*
February, 1921 . . .	6*d.*

9. The respondent company working normal full time (that was forty-eight hours per week) produced 2,200,000 lbs. and upwards of yarn a year. For the year ending February, 1921, the sales were only 769,000 lbs. and the deliveries in respect of those sales for the last six months of the year were only 420,000 lbs., dropping in the latter portion of the year

to about 6000 to 7000 lbs. a week instead of 42,000 or thereabouts. The yarns produced by the mill were sold to manufacturers in England who wove it into cotton cloth, and a considerable proportion of the cloth was sold to merchants in India and in China.

10. The loss sustained by the respondent company arose mainly from the following causes :—

(*a*) The extraordinary fall in the price of cotton.

(*b*) The falling off in orders for yarn.

(*c*) The failure of customers to take up the yarns for which they had given orders and cancellation by them of orders on a large scale.

(*d*) The great decrease in and ultimate extinction of the margin of profit in working during the year in question.

The said fall, falling off, failure and decrease were all exceptional in their extent and extraordinary, and resulted from the extraordinary and abnormal depression in the cotton and allied trades.

11. A witness who was engaged in the cotton trade in the years 1876 to 1878 and who recalled the conditions in those years was called before the Commissioners. He stated (and the Commissioners accepted his evidence) that in those years there was a depression in trade of a general character and not confined to or peculiarly more marked in the iron and coal trades, and that was confirmed by the official Board of Trade returns dealing with that period which were placed before the Commissioners. The witness further stated that the cotton trade was then affected to an exceptional extent, resulting in a complete extinction of profits. He further stated that the depression in trade in 1920–21 and subsequently was the most severe the country had ever gone through in his commercial experience, which extended to many years before 1876.

12. The unusually large and severe depression in the cotton trade had since April, 1921, resulted in the liquidation of a few cotton spinning companies, practically all being new companies formed during the boom to take over businesses previously carried on and capitalized at the inflated prices then ruling and in many liquidations or bankruptcies in the

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allied trades customers of spinners such as yarn agents, manufacturers and export shippers.

13. During the years 1912 to 1917 the annual profits of the old company varied between 669*l.* and 10,364*l.*, the figures for those six years being as follows :—

Year ended	February	24, 1912	5,749*l.*
,, ,,	,,	28, 1913	10,364*l.*
,, ,,	,,	28, 1914	8,046*l.*
,, ,,	,,	27, 1915	669*l.*
,, ,,	,,	26, 1916	6,571*l.*
,, ,,	,,	24, 1917	10,361*l.*

For the three years preceding the year of assessment the annual profits were as follows :—

Year ended	February	23, 1918	9,699*l.*
,, ,,	,,	22, 1919	17,747*l.*
,, ,,	,,	28, 1920	39,979*l.*
			67,425*l.*,

giving an average of 22,475*l.* or (after allowance for wear and tear of 6,016*l.*), leaving a taxable profit for the year 1920–21 of 16,459*l.*, while the accounts for that year after adjustment, but before making allowance for wear and tear, showed a loss of 11,268*l.* No question as to dates arose in the Case, it being agreed that the figures for each relevant fiscal year to April 5 should be those as ascertained for the financial year to the preceding end of February.

14. It was contended on behalf of the respondent company :

(1.) That the depression in the cotton trade was abnormal and unusual and that such an abnormal state of affairs was a specific cause, which enabled the taxpayer to have the advantage of the exception to the rule.

(2.) That the abnormal depression in the coal trade in the years 1876 and 1877 referred to in the reported cases mentioned below was not confined to that trade, but extended to trades generally, including the cotton trade.

(3.) That the decision of the Court of Session in *Miller* v. *Farie* (1) to the effect that the depression of trade was a

(1) 6 R. 270; 16 S. L. R. 189.

specific cause should be followed by the Commissioners, and the following cases were cited: *Miller* v. *Farie* (1); *Ryhope Coal Co.* v. *Foyer*. (2)

15. It was contended on behalf of the appellant (inter alia):—

(1.) That the cotton trade was one open to peculiar booms and depressions.

(2.) That a European war had always been succeeded by a boom period followed by a depression, and that in the present case all that had happened was merely one of the fluctuations of trade which because the boom had been greater the depression had been greater too—but was nothing more than exaggerated fluctuation in trade.

(3.) That there was nothing in either of the reported cases to show that the Commissioners in those cases considered anything outside the depression in the particular trade.

(4.) That on the facts before the Commissioners in the present case and the real view of those facts they ought to come to the conclusion that no specific cause had been shown within the meaning of the rule.

(5.) That the decision of the Court of Session in *Miller* v. *Farie* (1) was not binding on the Commissioners in view of the decision of the Court in the *Ryhope* case (2), that depression in trade might be a specific cause, but was not necessarily a specific cause.

For the appellant there was reserved the right, if it should become necessary in any Court hereafter, to contend that the *Ryhope* case (2) was wrong in its definition of specific cause.

16. Having considered the facts and contentions set forth in the case stated the Commissioners gave their decision in the following words: "The Commissioners consider that the depression in the cotton trade since January, 1920, was extraordinary and abnormal and did not arise merely from the ordinary fluctuations in business and further find that the profits and gains of the appellant's [the respondent's in the appeal] business have fallen short since that date

(1) 6 R. 270; 16 S. L. R. 189. (2) 7 Q. B. D. 485.

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from some specific cause (the said depression) within the meaning of r. 11 of the Rules applicable to Cases I. and II. under Schedule D."

On appeal the decision of the Commissioners was upheld by Rowlatt J.

The Crown appealed. The appeal was heard on July 9 and 12, 1926.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the appellant. The normal rule where there has been a succession in business, as in this case, is to assess the business as if there had been no change. The question in this case is whether a depression in the cotton trade can be regarded as a "specific cause" within the meaning of r. 11 of the Rules applicable to Cases I. and II. of Sch. D of the Act of 1918, so as to entitle the taxpayer to relief. Different views as to the meaning of this phrase have been taken by the Commissioners in the various reported cases. The normal rule is to apply the three years' average in the case of an old established business. The mere fact that the taxpayer can point to a specific cause for a falling off of profits is not in itself a sufficient ground for discarding the three years' average. To entitle him to relief under r. 11 there must be some abnormal cause. There is hardly a case in which a taxpayer cannot suggest a specific cause why his profits have diminished. Specific causes within the rule are such as the retirement of a partner who has large experience, or the destruction of the premises by fire or flood. Under the rule the obligation is cast upon the taxpayer of showing that there has been a falling off of profits due to a special cause. The decisions on the question of what constitutes a specific cause are not consistent with one another. There is nothing either in *Miller* v. *Farie* (1) or in *Ryhope Coal Co.* v. *Foyer* (2) to show that the Commissioners in those cases considered anything outside the depression in the "particular trade." In the latter case it was held that depression in trade may be a specific cause, but is not necessarily a specific cause. It is submitted that "specific"

(1) 6 R. 270. (2) 7 Q. B. D. 485.

means something specific to the particular individual and not to persons generally. It would make nonsense of the rule to hold that a "specific cause" meant any cause that could be specified to the Commissioners. The question is not one of fact but one of law. It is submitted that a general depression in the cotton trade, as in this case, is not within the purview of r. 11 and that no specific cause has been shown, within the meaning of that rule, which entitles the respondent company to relief.

[He also referred to Income Tax Act, 1842, s. 134; Finance Act, 1914 (Sess. 2), s. 4; Income Tax Act, 1918, s. 34; Miscellaneous Rules applicable to Sch. D, r. 3; Finance Act, 1921, s. 25.]

Maugham K.C., *Latter K.C.* and *Cyril King* for the respondent company. The question is whether the facts found by the Commissioners are capable of constituting a "specific cause" within the meaning of r. 11. The object of that rule was to mitigate the rule as to the three years' average in cases in which it would operate harshly on a successor in a business. Prima facie it may be fair to tax a successor on profits which he has never made. It is submitted that the respondent company is well within the mischief of the rule. The proviso in the rule operates where the successor is making less than his predecessor in the business owing to a specific cause. Some light is thrown on the meaning of the rule by a reference to ss. 133 and 134 of the Income Tax Act, 1842. Why should the proviso in the rule cease to operate because there are other persons in the same position as the applicant for relief who are not successors? Specific cause, it is submitted, means some cause which the applicant can specify to the Commissioners. Sect. 133 of the Act of 1842 was modified by the Revenue Act, 1865. The three years' average was introduced by r. 1 of Case I. of Sch. D in the Act of 1842. The amount of relief given by that rule was diminished by the Revenue Act, 1865, which in its turn was repealed by the Revenue Act, 1907.

The term "specific" cannot be limited in the way suggested by counsel for the appellant. It cannot be suggested that

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"specific cause" in r. 11 has a different meaning from what it had in s. 133. It must be something that is capable of being alleged to the Commissioners. It need not be specific to the particular trade. The rule is dealing with the case of the particular taxpayer. There is no reason for giving the words any but their ordinary meaning. The Finance Act, 1907, s. 24, shows that the Legislature did not intend that the Crown should always have the advantage of the three years' average. Neither in the Act of 1842 nor in the subsequent Acts is there anything to show that the Legislature pinned itself down to the three years' average as something sacrosanct and not to be departed from except in extraordinary cases. The test is whether the cause is specific with regard to the particular trade.

[SCRUTTON L.J. referred to s. 34 of the Act of 1918.]

You cannot spell out of the words that the "specific cause" is to affect only the particular trade and no others.

[They also referred to *Yuanmi Gold Mines* v. *Eborall.* (1)]

Further, the Legislature has had regard to the fact that "specific cause" may have a general application. For example it is provided by r. 4, sub-r. 2, that: "The payment of excess profits duty shall not be deemed to be a specific cause for the purpose of the miscellaneous rules applicable to this Schedule." So too by s. 35, sub-s. 1, of the Finance (No. 2) Act, 1915, it is provided: "The payment of excess profits duty shall not be deemed a specific cause for the purposes of s. 134 of the Income Tax Act, 1842." Those provisions show that but for their enactment the payment of excess profits duty would be regarded as a specific cause.

Rule 11, it is submitted, affords no ground for giving a narrow construction to the words "specific cause."

Again, *Miller* v. *Farie* (2) and *Ryhope Coal Co.* v. *Foyer* (3), in which the facts proved were held capable of being regarded as constituting a "specific cause," have stood unchallenged for forty-five years, and as was said by Lord Sumner in

(1) [1921] 2 K. B. 544. (2) 6 R. 270.
(3) 7 Q. B. D. 485.

John Smith & Son v. *Moore* (1), "Tax cases ought not to be unsettled."

R. P. Hills replied.

LORD HANWORTH M.R. This is an appeal from a decision of Rowlatt J., who confirmed the decision of the Commissioners. The Commissioners had given certain relief to the respondent company in this case upon whom an assessment had been made in respect of the profits of the business of cotton spinners, carried on by it at Shaw, near Oldham, for the income tax year ending April 5, 1921. The respondent company was incorporated on January 14, 1920, and was formed to take over the assets and undertaking of the Duchess Spinning Co., Ld. It continued to carry on the business which it acquired from the old company, and for the year ending February 26, 1921, up to which the accounts were made up, it sustained a loss amounting to 11,268*l.* as computed for income tax purposes.

It is important to note that the relief which the company asked for arises by reason of its having succeeded to the business of the old company within the meaning of r. 11 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, and to lay emphasis on that fact, because r. 11 applies only to cases where there has been a succession in business and is not therefore of wide or general application. The result is that this case, which at first sight seems to involve a general principle, involves only a principle particular to such persons as are able to bring themselves within the rule which entitles them to ask for relief on the ground that there has been a diminution of their profits owing to a specific cause.

The facts must be a little further stated. During a number of years in which the old company had been carrying on business considerable profits had been made. For the year ending February, 1918, nearly 10,000*l.* was made, and for the year ending February, 1919, nearly 18,000*l.*, and for the year ending February, 1920, nearly 40,000*l.* The result was

(1) [1921] 2 A. C. 13, 39.

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that upon a three years' average there was a profit of 22,475*l.* But, in fact, for the year ending April, 1921, the year in respect of which the present assessment was made, so far from any profits having been made, there was a loss of 11,268*l.*, and that before making any allowance which is permitted under the Act for wear and tear. These figures, therefore, show that as between the duty to pay on profits and gains estimated upon the three years' average on a sum of 22,475*l.* and the true facts of the case there was a difference to the company of no less a sum than of 33,600*l.* approximately, because what had been or was estimated as a 22,000*l.* profit was, in fact, an 11,000*l.* loss.

The facts that gave rise to that loss are stated in the case. It appears that the respondent company working normal full time (48 hours a week) produces 2,200,000 lbs. of yarn in a year. For the year ending February, 1921, the sales were only 769,000 lbs., and taking the last six months of the year it was delivering not more than about 6000 lbs. or 7000 lbs. a week instead of 42,000 lbs. The figures are striking and remarkable. The Commissioners who heard the case had evidence before them which showed that the cotton trade is one which is peculiarly liable to periods of boom usually followed by periods of depression, but they also had very remarkable evidence, which they accepted, from a witness who was able to speak of his own knowledge back to the years of the cotton trade in the seventies, and he gave evidence that except for an exceedingly remarkable period of depression in the seventies there had been no such depression in the ordinary course of trade until the depression of 1920–21. The Commissioners say that the fall in trade, the falling off in the orders, and the failure of the customers to take up the yarns for which they had given orders, and the decrease to ultimate extinction of the margin of profits were all exceptional in their extent and extraordinary, and were the result of extraordinary and abnormal depression in the cotton and allied trades. Upon the evidence laid before them, the Commissioners held upon the question of fact, which is for them, that the depression in the cotton trade since January

1920, was extraordinary and abnormal and did not arise merely from the ordinary fluctuations in business. Taking those remarkable and distinctive facts we have to determine whether the Commissioners were right in allowing an adjustment to be made in relief to the company on the ground that there had been a loss of business due to a specific cause, and whether Rowlatt J. was right in confirming the relief thus given by the Commissioners.

It is perhaps important, as the cases on the question of what constitutes a "specific cause" have not been many, to recall the history whereby provision has been made for the subject obtaining relief where there has been a great divergence between the estimated profits and gains and the actual result of the year's trading. Under the Income Tax Act, 1842, as is well known, the duty of income tax charged was computed on a sum not less than the full amount of the balance of the profits of the trade upon a fair and just average of three years; but in that Act provision was made which enabled an adjustment to be made in certain circumstances. Thus under s. 133, where the person charged to the duty on an average of three years found and proved to the satisfaction of the Commissioners that his profits and gains during such year for which the computation was made fell short of the sum so computed, then he could ask for the assessment made for the current year to be amended in respect of such source of profit as the case should require. That provision, which was wholly in favour of the taxpayer, and did not give any corresponding right to the Crown, which represents the body of taxpayers, was amended and altered by the Revenue Act, 1865, which by s. 6 provided that no such reduction or repayment should be made in any such case unless it was found that there was a loss after taking into account the actual year in respect of which the relief was claimed. The three years were to include the year in which the loss was alleged to have occurred and the relief was limited to the difference between the average and the amount of the assessment. The relief thus given was much curtailed, because the year of loss became an integral factor in the computation of the true

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assessment. That system was ultimately abolished by the Finance Act, 1907, which by s. 24 took away the relief given by s. 133 of the Act of 1842, and left only, under sub-ss. 2 and 3, relief in the case of a trade set up within three years in respect of which, instead of the average, the actual amount of profits and gains could be taken, or under sub-s. 3, where the trade was discontinued, the actual amount could be taken, but broadly speaking the relief which had been given by s. 133 of the Act of 1842 and reduced by the Act of 1865, was from 1907 withdrawn. There was, however, by another Act, the Customs and Inland Revenue Act, 1890, an opportunity given to the taxpayer where he could prove that there was an actual loss on the whole trade, on giving notice within six months after the year of assessment to apply to have an adjustment of his liability. That, in turn, has been replaced by s. 34 of the Income Tax Act, 1918. So far we have not been dealing with the case of loss arising from a specific cause. However, s. 134 of the Act of 1842 provided that where a person ceased to carry on a trade or died or became bankrupt or insolvent or from any other specific cause should be deprived of or lose the profits and gains on which the computation of duty was made it was lawful for him to make an application within three months after the end of the year and, upon proof to the satisfaction of the Commissioners, the Commissioners could give such relief to the party as should be just. There was also a proviso to that section, that where a person had succeeded to the trade or business of the party charged no such abatement was to be made, although he was a successor in business and the assessment made on the business was to stand, unless it was proved to the satisfaction of the Commissioners that the profits and gains of that trade had fallen short from some specific cause, to be alleged and proved since such change or succession took place or by reason thereof, that is, by reason of the alteration and change in the business. That is the section of the Act which first indicated that a "specific cause" might be used by the taxpayer to his relief. There was also another provision, which was contained in r 4 of the Rules applicable to Sch. D,

which enabled relief to be asked for before the time of making the assessment or within the period for which the assessment ought to be made. Then, where there had been such succession, notwithstanding such change the assessment was to stand unless the partners or the persons succeeding could prove—that is before the time of assessment or within the period of assessment—that the profits and gains had fallen short or would fall short from some specific cause. Those two methods of obtaining relief by way of specific cause related thus to persons who made application within a limited time after the assessment and to those who made an application before the making of the assessment or within the period of assessment and were able to bring themselves within the rule or the section by reason of the fact that there had been a change or succession to such business. To finish the history of r. 4, it may be recalled that that rule is now replaced by the rule which we have to consider in the present case—namely, r. 11 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, which is in pari materia with the last rule which I have referred to, and which, to recapitulate, requires a succession in business and then proof that from some specific cause or by reason of the succession or change there has been a falling off in the profits. Sect. 134 has also been replaced by an appropriate provision in the Consolidating Act of 1918—namely, r. 3 of the Miscellaneous Rules contained in Sch. D of the Act of 1918. Rule 3, para. 1, takes the place in lieu of s. 134. Under that rule we have in para. 1 the case where a person ceases to carry on a trade or dies or becomes bankrupt or is deprived of his profits from some specific cause and makes an application within three months after the end of the year of assessment. Para. 3 relates to the case where there has been a succession, but it does not deal with the cases of ceasing to carry on or dying or becoming bankrupt. It will be thus seen, that whether you are dealing with s. 134, as it was, or the old r. 4, or their successors, you are dealing with a relief which can be given only where something else than mere loss from a specific cause is to be found—namely, where there has been a

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succession to or an ending of the business, or death or bankruptcy or the like. There are a limited number of cases only in which the relief can be given.

We have here on the facts which I have recounted a clear statement that this company has brought itself, by reason of its succession to the business of the former company which it bought, within r. 11. But that does not enable us to determine the important question, "What is a specific cause?" The matter has been considered and dealt with by several legislative enactments recently. In the course of the war, in the Finance Act, 1914 (Sess. 2), provision was made by s. 13 to reintroduce the relief or the opportunity of relief given by s. 133, modified by s. 6 of the Act of 1865, to which I have referred, and where it is proved to the satisfaction of the Commissioners by whom the assessment had been made that the diminution of profits or gains on account of which relief was claimed under those sections was due to circumstances attributable directly or indirectly to the then present war, whether those circumstances were a specific cause of the diminution of income within s. 134 or not, relief might be asked for. That does not seem to assist us much, but the argument can be based upon it that it is at least apparent from the legislation that it was thought not impossible that a claim for relief arising directly or indirectly from losses due to war, should be regarded as losses due to a specific cause. That section was replaced by ss. 43 and 44 in the Act of 1918, but they in their turn were finally repealed by s. 25 of the Finance Act, 1921. When the excess profits duty was established, as it was, by Part III. of the Finance (No. 2) Act, 1915, a special provision (s. 35, sub-s. 1) was inserted, that the payment of excess profits duty should not be deemed a specific cause for the purposes of s. 134 of the Income Tax Act, 1842. That appears also to justify an argument that it was thought not impossible that a tax due to the war and a burden thus thrown upon the taxpayer might be claimed to be a specific cause, although it was one of general application.

The only other section which appears to give some indication of the meaning of "specific cause" appears to be s. 26 of the

Finance Act, 1921, which is as follows: "Paragraph (1.) of Rule 3 of the Miscellaneous Rules"—which I have read and which related to the adjustment of the tax where there had been death, or ceasing to trade, or the like—" shall not apply in any case where the person charged to tax has continued to carry on throughout the year of assessment the trade, profession, employment or vocation in respect of which the assessment was made." That section seems to have been passed with the object of removing the possibility of using r. 3 where the trade was carried on through the year of assessment. So that in a case where in the course of carrying on trade a " specific cause " might have been relied upon for the purpose of adjusting the burden of the taxpayer, that was removed. It appears to me to give some indication that " specific cause " might be made use of generally and widely; in other words, that " specific cause " was not a special idiosyncrasy of the trade, but one which might open the door to relief where the trade was carried on and affected by something which was of general application, but which yet could be relied upon as a specific cause.

I have gone through the sections of the Acts, because they have all been referred to, and perhaps it was important to refer to their history in order to see that but little help is to be obtained from later legislation, although it may be said that the Legislature has not failed from time to time and in a number of Acts to deal with the relief which was made possible from a specific cause originally in the two provisions in the Act of 1842 to which I have referred. It appears to me that the matter must be looked at from the point of view of the taxpayer claiming relief. We have not to determine or lay down a wide rule; we have to consider what are the rights of the taxpayer who is able to establish, and has in the present case established by these very striking figures, that a decrease so exceptional has resulted from extraordinary and abnormal depression in the cotton trade.

One comes back to consider what does " specific cause " mean? Does it mean some cause which is peculiar and individual to the subject who puts it forward as contrasted

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with the case of those who are his competitors in trade and cannot allege that the cause indicated affects them? or does it mean a cause which can be pointed out and identified which affects the taxpayer who claims the relief, though it is one which also affects traders in a district or area similarly and may be general to a large number of them, indeed common to a number of persons in the same trades or in allied or other trades? The fluctuation of trade is recognized in the Income Tax Acts. It is because of the ebb and flow natural to trade that the system of calculating profits upon a fair and just average of three years is provided by the rule applicable to Case I. of Sch. D. This system would appear to be the means provided to meet the uncertainties of any particular year or period of successive years. Bad trade in one important trade will have its effect on many others. The trade of the country may be passing through a period of depression affecting all or most trades. This provision as to the three years' average system alleviates the position of the trader to some extent and gives the measure of relief according to such circumstances. But, in the present case, the depression, as I have pointed out, is described by the Commissioners as extraordinary and abnormal. They say it did not arise from the ordinary fluctuations in business, and we have to determine whether or not the Commissioners in dealing with this particular company have been right in holding that it has proved that its loss was due to a specific cause.

There are two cases, and two cases only, that have reference to this matter. The first is *Miller* v. *Farie*. (1) It may be pointed out that in that case the Lord President held that the specific cause may be proved to the satisfaction of the Commissioners, whether it occurs before or after the change or succession which enables the taxpayer to rely upon it. I agree with that view of the Act; I do not think it is necessary for the taxpayer to show that the specific cause has arisen after the change or succession. It was held in that case, following the finding of the Commissioners, that there was

(1) 6 R. 270.

a specific cause which reduced the profits—namely, the depression in the coal trade. That was so found by the Commissioners, and apparently the Court accepted that view, although it may be observed in passing that the difference between the average, 1289*l.*, and the actual return for the year in question, 843*l.*, was so small that if it had come before a Court without a finding of the Commissioners, one would have supposed that the three years' average was abundantly sufficient to meet the figures in that case. It does not, however, take away from the authority of the acceptance in that case by the Court of the view that a depression in trade may be a specific cause.

The other case is *Ryhope Coal Co.* v. *Foyer*. (1) The actual arguments are not set out in the report, but are said to be reproduced in the judgments of the Court. Grove J. in dealing with the matter said (2): "I expressed during the argument very considerable doubt whether the phrase 'specific cause' could apply to the ordinary fluctuations of trade. I certainly do not adopt the arguments of the appellants here, and say, that 'specific cause' means specified cause. I do not think that is the proper meaning of the word 'specific,' either in grammar or within this Act. A specific thing, and a specified thing are to my mind totally different; I think 'specific cause' must be something capable of expression, but also something exceptional, it must not be the ordinary fluctuation incident to every business. The Scotch Court in the case that I have mentioned held that the depression of trade was a specific cause. I do not differ from them, in one sense I agree with them, except that I should put it thus, that depression of trade may be a specific cause, but is not necessarily a specific cause"—and he there dealt with the case upon the finding of the Commissioners of the extraordinary depression in the iron and coal trades. It must be remembered, as I have pointed out, that, in addition to the three years' average, certain trades are measured otherwise. In the coal trade a longer average is taken—namely, five years; and in some other trades, such

(1) 7 Q. B. D. 485. (2) 7 Q. B. D. 496.

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as gasworks and the like, it is the profits of the previous year. It appears to me that the averages, whether they be three or five years or the previous year's trading, allow for the ordinary fluctuations of trade, and those fluctuations may be wide according as the tide is, if I may repeat the metaphor, a neap tide or a spring tide, but it does not necessarily exclude the fact that where you have an abnormal and extraordinary depression you may not have something which is far outside the ordinary fluctuations of trade. Lindley J. (as he then was) said (1): "The only question that remains is this, is it (the depression in the iron and coal trades) specific? If it can be, the Commissioners find that it is. I am not prepared to say that it is not . . . . and as the Commissioners find that the profits have fallen off by a cause which is specific, or may be specific, depending upon the sense in which the word was used, I am not prepared to say the cause is not specific."

That decision of Grove and Lindley JJ. has held the field since the year 1881. There appears to be no other case in which the attempt has been made to construe the words "specific cause." It appears to me that the cause that is referred to is not necessarily one which is peculiar to the subject who claims the relief, but is one which may possibly be relied upon by a number of traders, and is general in that sense. On the other hand it is to be pointed out that unless the trader brings himself, by means of succession or by fulfilling the other conditions in the rule, within r. 11 he is not entitled to raise the question of specific cause at all. The result is that this decision or any other decision upon "specific cause" is not a matter of very wide application.

In the present case, following the explanation of "specific cause" offered by Grove J. and acquiesced in by Lindley J., it appears to me that the finding of the Commissioners here, that the cause of these remarkable figures was an abnormal and extraordinary depression, such as had not occurred for some forty or fifty years, justified them in giving the special relief in this particular case, inasmuch as the

(1) 7 Q. B. D. 501.

company had fulfilled the requirements of both limbs of r. 11, that is, it had shown that it had succeeded to the business previously carried on and had established by evidence, accepted by the Commissioners, that this depression was abnormal. In those circumstances, without further attempting to define "specific cause," I think the appeal must be dismissed. It appears to me that "specific cause" must be left where Grove J. left it—namely, that an ordinary fluctuation in trade is not a specific cause, but where there is some extraordinary depression there may be a specific cause, if that is so found by the Commissioners.

I think therefore that the decision of Rowlatt J. was right, and that the appeal must be dismissed with costs.

SCRUTTON L.J. The Court, with occasional assistance from counsel, took more than a day in discussing this case, but in my view both parties agree that the question to be decided can be stated very shortly, although they differ as to what it is. As I understand the Crown they say: The question is what is the meaning of the word "specific" in a context where the successor to a business can break away from the three years' average by proving that since he has been in the business he has lost profits from a specific cause. The taxpayer more correctly, I think, through the voice of Mr. Maugham, says: The question is: Can the Court interfere with a decision of the Commissioners who have found that there was a specific cause for the diminution of profits in this case?

Now what is alleged to be the specific cause for the diminution of profits is the trade depression in the cotton trade, which followed the great boom which took place after the war. On the question of trade depressions we have the guidance of the decision of the Court of Queen's Bench given forty-five years ago by Grove J. and Lindley J. (as he then was), which Parliament, having full knowledge of for forty-five years and having repeatedly made alterations by statute in the circumstances under which a taxpayer can claim relief from income tax by reason of his losses in business, has never

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altered. In those circumstances I should be very slow to interfere with a decision which has stood for forty-five years, and which Parliament, which may be presumed to know what it meant originally by "specific cause," has not altered, knowing the interpretation that has been put upon it. If I am to start with the decision in the *Ryhope* case (1), to which I have referred, and if the depression there was a specific cause, still more is this depression a specific cause. In the *Ryhope* case (1) all that was stated by the Commissioners was: "The extraordinary depression in the iron and coal trades whereby the appellants were unable to sell either so large a quantity of their coals as they had formerly been enabled to do, or to obtain anything like so good a price for such coals." That was the specific cause alleged. Lindley J. in a passage which I am bound to say is not so enlightening as that great judge's judgments usually are, stated that he was not prepared to say that the Commissioners were wrong in finding that to be a specific cause. He said (2): "A thing is specific as contrasted with something else, and whether it is contrasted with trade in general or trade in a locality, or whether it means something confined to a particular mine, is all more or less doubtful, and as the Commissioners find that the profits have fallen off by a cause which is specific, or may be specific, depending upon the sense in which the word was used, I am not prepared to say the cause is not specific." I am bound to say that personally that does not help me very much, except that Lindley J. did feel himself unable to interfere with Commissioners who had found that a depression was specific simply on the facts I have read—an extraordinary depression whereby the appellants were not able to sell so large a quantity of their coals as they had sold before. Grove J., who did give a more precise definition of "specific cause," to which I shall have to refer later, said (3): "I think 'an extraordinary depression in the iron and coal trades,' which reduces the profits of a concern to less than half its former profits, is properly called a 'specific cause.'"

(1) 7 Q. B. D. 485, 489. (2) 7 Q. B. D. 501.
(3) 7 Q. B. D. 496.

And Parliament, having that decision before it and having altered these Acts on several occasions, has left "specific cause" standing where it was after that explanation of how the Courts regarded it.

Now what are the facts of this case as compared with the facts in the *Ryhope* case? (1) The Commissioners had before them a witness who must be of the greatest antiquity, because not only did he remember what happened in 1876, that is fifty years ago, but he had an experience which extended to many years before 1876. I really shudder to think how old he must have been if he meant that his commercial experience commenced many years before 1876. This venerable witness said that this particular depression following the war was a long way the worst in his extremely lengthy experience. The Commissioners found that it was a severe and exceptional depression, an extraordinary and abnormal depression in the cotton and allied trades, and that the loss sustained by the respondent company, which was that profits of 40,000*l.* in the year 1920 were turned into a loss of 11,000*l.* in the year 1921—a very much greater change than was found in the *Ryhope* case (1)—was due to "(1.) The extraordinary fall in the price of cotton"—which by itself would seem rather an advantage to the manufacturer if his raw material fell in price, but I suppose the Commissioners must mean, though they do not say so, that the manufacturer was overstocked with stock bought at a high price and then suddenly the price fell from 30*d.* to 6*d.* per lb., whereby his competitors buying cheaply were enabled to reduce the price enormously; "(2.) The falling off in orders for yarn; (3.) The failure of customers to take up the yarns for which they had given orders and cancellation by them of orders on a large scale"—the Commissioners do not say whether that cancellation was a breach of contract or in accordance with the contract—"and (4.) the great decrease in and ultimate extinction of the margin of profit." At any rate these Commissioners' findings are very much more detailed than were those of the Commissioners in the *Ryhope* case (1), and they

(1) 7 Q. B. D. 485.

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have said that certain matters which do not naturally follow any depression have been the cause of the very great change in this case. It seems to me, therefore, that if Lord Lindley was not able to interfere with the Ryhope Commissioners on the ground that there were materials which entitled them to find a specific cause when the simple statement was that it was an extraordinary depression by reason of which they sold fewer goods, still more am I unable to interfere with the findings of these Commissioners, who have given a much more detailed finding, showing, in my view, a much greater depression than existed at the time of the *Ryhope* case. (1) But if, as I think, the definition of " specific cause " is probably wider than that given by Grove J., still more am I unable to interfere.

In my view " specific " means stated with precision as opposed to a mere statement of fact without assigning a precise or determined cause for it. I find that leaving out the medical, pathological, zoological and botanical meanings of " specific " in the Oxford Dictionary and turning to the more ordinary English it is " Precise or exact in respect of fulfilment, conditions, or terms; definite, explicit, exactly named or indicated, or capable of being so; precise, particular." I should have thought that was the more ordinary meaning of " specific," and I myself should not have agreed with Grove J. when he says that specific does not mean specified—that the two things are different. I should have thought they were the same thing, one in the form of a verb and the other in the form of an adjective. Grove J. says that he thinks specific means abnormal. Now I do not think that the word " specific " can ever mean abnormal. I should have thought, if " specific " means anything like that, it probably means normal—the normal and not the abnormal qualities of the species. But I can quite see how you can bring abnormality into the question of " specific cause." A man wants relief from tax because his profits have dropped, and if when you ask him " why ? " he simply answers: " They have dropped because I have done less

(1) 7 Q. B. D. 485.

business" ; he is there only repeating over again his original statement that the profits have dropped—they have dropped because there is less material for them to come out of. If you are simply saying "My profits have dropped because I have sold less goods," I think you are merely repeating the same thing over and over again. It may be therefore that when Parliament said the profits must have dropped from a "specific cause," it must have meant by that phrase that you should say something more than they have dropped in the ordinary course of business, having regard to the amount of business done. In that sense you can bring in an abnormal trade fluctuation as compared with the ordinary trade fluctuations. Only in that sense I think can you extract abnormality out of the word "specific," which does not, in my view, ever mean abnormal by itself, but may possibly in its context have the result that you have to look for abnormality. In my view "specific cause" in itself means a precisely stated definite cause as distinguished from a mere statement, "I have lost profits because I have made less money," or words to that effect. I can quite see that it is a question of degree when the fluctuation of trade becomes so extensive that you can treat it as giving something more than a mere statement, "I have made less profits because I have done less business," but I should not myself assent to the rather narrow view which I think Grove J. has taken of the meaning of "specific." Lord Lindley did not define at all what he meant by "specific," except by saying that he could not interfere with the Commissioners who had found that an extraordinary depression was a "specific cause." With some of Grove J.'s language I think I should disagree, but the result remains the same. If I am right in my view of "specific," still less can I interfere with the decision of the Commissioners than if Grove J.'s view is the right view of "specific." In either case it is not possible, in my view, to interfere with the view of the Commissioners, and therefore this appeal must be dismissed with the usual consequences.

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ROMER J. I agree. I think we cannot possibly interfere with the findings of the Commissioners in this case unless we are prepared to overrule the decision in the *Ryhope* case. (1) That case was decided forty-five years ago, and so far as I know, it has never been adversely criticized by any judicial authority and must have been acted on over and over again. In those circumstances, having regard to what Lord Sumner said in *John Smith & Son* v. *Moore* (2), to which our attention was called, that "Tax cases ought not to be unsettled," I should find it my duty to follow that case even if I had doubts myself about the decision; but I have no such doubts. On the contrary I think the case was rightly decided, although, like Scrutton L.J., I find myself unable to subscribe to everything that was said by Grove J. in the course of his judgment, and I should like to add that as to the meaning of the words "specific cause" I find myself in complete agreement with what Scrutton L.J. has said.

Solicitor for the appellants: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Rawle, Johnstone & Co., for John Taylor & Co., Blackburn.*

(1) 7 Q. B. D. 485. (2) [1921] 2 A. C. 13, 39.

W. I. C.

[IN THE COURT OF APPEAL.]

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1926
July 27.

FAULKNER *v.* OWNERS OF SHIP SUTTON.

Workmen's Compensation—Fatal Accident—"Dependants"—"Child" under the age of Fifteen—"Member of a family"—Sister—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sch. I., para.* 1 (*a*)—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 2—*Workmen's Compensation Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 8, *sub-s.* 1.

The Workmen's Compensation Act, 1923, s. 2 (re-enacted by the Workmen's Compensation Act, 1925, s. 8, sub-s. 1), provides: "Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent, then: . . . . (*b*) if the widow or other member of the workman's family or such child or children as aforesaid, or any of them, were partially dependent on the workman's earnings, there shall be paid" the additional compensation therein provided:—

Held, that a sister (under the age of fifteen) of a workman who met with a fatal accident arising out of and in the course of his employment was a "child" within the meaning of the section, so as to make increased compensation under the section payable when such sister is left partially dependent upon the workman's earnings.

Pritchard v. *Bettisfield Colliery* [1925] 2 K. B. 284 followed.

Scott v. *London and North Eastern Ry. Co.* [1926] 2 K B. 204 distinguished.

APPEAL from an award of the county court judge of the Runcorn County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The workman, Robert Edwards, a boy of sixteen, met with a fatal accident by drowning on November 25, 1925, whilst in the employment of the respondents as a sailor. He was at that time contributing out of his earnings to the family purse, which amounted to the weekly sum of 3*l.* 14*s.*, a sum of 1*l.* a week. Arbitration proceedings were commenced for compensation, the applicants being the workman's mother, his two sisters Eleanor and Cora, now aged twelve and ten years respectively, and his stepfather. The claim of the latter was not pressed. The county court judge found that the two sisters were partially dependent upon the deceased for their support. The question for decision was whether the two sisters were entitled as being "children under the

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age of fifteen years " to the additional compensation provided by s. 2 of the Workmen's Compensation Act, 1923. On behalf of the respondents it was contended that the section applied only to the children and remoter descendants of a deceased workman, and did not apply to sisters. On behalf of the two sisters it was contended that the section applied to all young persons under the age of fifteen years who were dependent members of the deceased workman's family.

The county court judge, following *Pritchard* v. *Bettisfield Colliery* (1) and *Scott* v. *London and North Eastern Ry. Co.* (2), held that the two sisters being dependants and children under the age of fifteen years, were entitled to the additional compensation provided by s. 2 of the Act of 1923, and awarded the three dependants, the mother and the two sisters, the sum of 165*l.*; but being informed that an appeal was contemplated he made no apportionment of that sum among them.

The respondents appealed. The appeal was heard on July 27, 1926.

Greaves-Lord K.C. and *W. Clothier* for the appellants. The question is whether sisters are children within the meaning of s. 2 of the Workmen's Compensation Act, 1923, so as to entitle them to the additional allowances provided for by that section. It is submitted that " children " in that section means descendants of the deceased workman, and does not extend to collaterals so as to include brothers and sisters. In *Pritchard* v. *Bettisfield Colliery* (1), an illegitimate grandchild of a deceased workman was held to be a " child " within the meaning of that section. In *Scott* v. *London and North Eastern Ry. Co.* (2) the illegitimate children of the wife of a deceased workman by another man born before her marriage to the deceased were held not to come within the definition of " dependants " or " member of a family " in s. 13 of the Act.

By s. 2 of the Act of 1923 : " Where a workman leaves a widow or other member of his family (not being a child under

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the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent, then" such children are to be entitled to the additional compensation provided for by that section. By s. 24, sub-s. 2: "No deduction shall be made under para. 1 (*a*) (i.) of the First Schedule to the principal Act, as amended by s. 2 of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said s. 2, nor so as to reduce the amount payable under the principal Act below 200*l*." It is submitted that Parliament has in that sub-section defined what was meant by children in s. 2—namely, the children of the deceased workman and no others. The question of dependency must be determined as at the date of the death. In the present case the workman died on November 25, 1925. At that date the Act of 1925 had not come into operation, though it was in operation at the date of the hearing before the county court judge.

Rice-Jones for the respondents was not called upon.

LORD HANWORTH M.R. This is an appeal from the learned judge of the Runcorn County Court, who has fixed a sum payable to the dependants of a deceased workman, who suffered an accident in 1925. Robert Edwards was drowned, and the dependants, for whom a sum is asked, are his mother and two sisters. Of the two sisters, one Eleanor was born in 1914, so she is approximately twelve years old, and the other Cora was born in 1916, so she is approximately ten years old now. It is said that these two sisters are not entitled to the benefit of s. 2 of the Workmen's Compensation Act of 1923. I refer to that section (although it is now replaced by s. 8 of the Act of 1925) because, for the purpose of considering the previous cases, it is easier to recall the fact that what we are dealing with is what was s. 2 until May of 1925, when the new Consolidation Act of 1925 came into force. Sect. 2 runs in this way: "Where a workman leaves a widow or other member of his family (not being a

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child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent," then certain consequences, by way of sums paid, are to follow.

It is argued that the learned county court judge was wrong in including the two sisters of the deceased man as dependants who are entitled to receive the benefit of sub-s. (*b*) of s. 2. The point is an extremely short one, and depends upon the interpretation to be given to those first three lines of the section. It appears to me that our decision will be in accord with the decision we have already given in *Pritchard* v. *Bettisfield Colliery* (1); and the point that arose in *Scott* v. *London and North Eastern Ry. Co.* (2) does not appear relevant. In my judgment the word "child" in the phrase "not being a child under the age of fifteen" is to be construed in both parts of the section in the same sense. The purpose of putting those words "not being a child under the age of fifteen" in brackets is to show that in considering who are the persons who are within the words "other member of his family," you are not to include a child under the age of fifteen—for this reason, that such children are dealt with by the affirmative words of the section later on, after the words "in addition."

It is suggested that the words "not being a child under the age of fifteen" mean, or must be taken to indicate that the expression "other member of his family" is not to have the wide interpretation it has in s. 13 of the Act of 1906, so as to include sisters, but ought to be interpreted as meaning direct descendants. It does not appear to me that the interpretation can be so limited. The object of putting those words in brackets was that such children should not be counted as members of the family at that particular place in that section. There is no reason for putting the very limited construction upon the words "or other member of his family," and it appears to me that they do include sisters.

For these reasons I am of opinion that the learned county court judge was right. I have specially restricted my

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judgment and observations to matters which are relevant to the present case, because having regard to what was said in *Pritchard's* case (1) and the argument in *Scott's* case (2) with reference to these matters of family relationship, it is very easy to go beyond what is necessary to decide in the particular case and to utter dicta which may cause difficulty in future.

The appeal will be dismissed with costs.

WARRINGTON L.J. I agree, and only desire to say that I think this case comes within the principle of the decision in *Pritchard's* case (1), and is not affected by the decision in *Scott's* case (2), which concerned a person who was not a member of the family.

SCRUTTON L.J. I agree. The Act of 1906 provided that if an accident happened to a workman, his employer should be liable to pay compensation in accordance with the First Schedule, and when you turn to that Schedule, you find that where death results, if the workman leaves any dependants, so much is to be paid. If you turn to s. 13, you find that "dependants" are defined as meaning "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death": where the workman, being the parent or grandparent of an illegitimate child, leaves such child so dependent upon his earnings, the word "dependant" is to include such an illegitimate child: you have also a definition given of "member of a family," which includes, amongst others, brother and sister. Then came the Act of 1923, and owing to the fall in the value of money, it was desired to increase the gross amounts payable, and not to reduce the amount payable to the children by the amount which had been payable to the workman before his death. That was done, so far as the children were concerned, by ss. 2 and 24, which are now rolled into one in the new Act of 1925 (s. 8). The language of s. 2 is this: "Where a workman leaves a widow, or other

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member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition, leaves one or more children under the age of fifteen so dependent" and so on. Now, the question is whether, when the word used is "a child," it means the son or daughter of the workman, or whether it means a young person who is a member of the family.

In this case the workman has died leaving two sisters under the age of fifteen. It appears to me that s. 2 is dividing up the members of the family and dependants existing—a widow, or other member of his family (not being a child under the age of fifteen), and the children under the age of fifteen dependent upon the workman and not included in the first sentence, "a widow or other member of his family." It seems to me the correct view is to read the word "child" as meaning, not his child by parentage, but a child or young person under fifteen in both parts of the section.

The learned county court judge has arrived at that conclusion, but he has done so by treating *Pritchard's* case (1) as inconsistent with *Scott's* case (2), and preferring the former. In my view, there is no inconsistency between the two cases. The only inconsistency arises from certain dicta in *Pritchard's* case (1) of one member of the Court, which are inconsistent with the view taken in *Scott's* case (2), but they do not in any way affect the decision in that case. In *Pritchard's* case (1) the argument was that "a member of his family" does not include an illegitimate grandchild, and consequently, when you have "widow, or other member of his family," you must leave out an illegitimate grandchild. That case (1) lays stress on the words "so dependent," and inasmuch as an illegitimate grandchild, who is expressly mentioned as a member of the family or dependant, was dependent upon the workman, it treats the illegitimate grandchild as a child who was left behind. In that, as I said in *Scott's* case (2), I entirely concur.

Scott's case (2) was this: A man married a woman who had previously had an illegitimate child by another man,

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and the putative father was in fact partially supporting it, but some support was given by the dead man who had married the mother of the child; and it was attempted to argue that the workman left a child behind when he died, leaving a child of his wife by another man. That view the Court of Appeal in *Scott's* case (1) rejected, saying that s. 2 was confined to members of the family, and that an illegitimate child of the wife of the deceased workman by another man was neither a member of his family within the definition of "member of a family," nor a dependant within the definition of "dependant."

Those two decisions appear to me to be entirely consistent with one another, and entirely in accordance with the view I am taking of s. 2. What was inconsistent between the judgments in *Scott's* case (1) and *Pritchard's* case (2) was that one member of the Court in *Pritchard's* case (2) read "child" in s. 2 as meaning any young person, whether a member of the family or not, so as to cover a young person who had been adopted, or not even adopted. *Scott's* case (1) is inconsistent with those dicta, but that difference has nothing whatever to do with the particular point we had to decide in that case, and, therefore, when the learned county court judge says that he finds, on the point he has to decide, a difference between *Scott's* case (1) and *Pritchard's* case (2), and follows the reasoning of *Pritchard's* case (2), I think he has not appreciated the point the two cases decide, and on that point I disagree with him, though I think, for the reasons I have given, that he has arrived at the correct result. The case must go back for the amount to be apportioned between the various dependants.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Lake & Son, Runcorn.*

(1) [1926] 2 K. B. 204. (2) [1925] 2 K. B. 284.

W. I. C.

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1926
June 18, 21.

[IN THE COURT OF APPEAL.]

GUARDIANS OF PONTYPRIDD UNION *v.* DREW.

Poor Law—Relief—Right of Guardians to recover—Poor Law Amendment Act, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 58.

Poor law guardians have no right at common law to recover from the recipient in respect of poor relief given otherwise than by way of loan, where the recipient is a person of full age and capacity to contract.

Birkenhead Union v. *Brookes* (1906) 95 L. T. 359 overruled.

Judgment of Divisional Court [1926] 1 K. B. 567 reversed.

APPEAL from the judgment of a Divisional Court (1) reversing the judgment of the Pontypridd County Court.

The plaintiffs claimed to recover 6*l.* 12*s.* 6*d.* from the defendant as the cost of goods supplied to him during several weeks in 1921 by way of ordinary poor relief, or, alternatively, as poor relief by way of loan under the Poor Law Amendment Act, 1834.

The county court judge found that the first weekly supply to the defendant was intended by the plaintiffs as ordinary relief; and that the subsequent supplies were intended by them as relief by way of loan, but that no intimation of this was made to the defendant, who received all the goods in the belief that he was receiving ordinary relief. He gave judgment for the defendant on the ground that the plaintiffs were not entitled to recover either by statute or at common law. On appeal the Divisional Court (Salter and Acton JJ.) held that they were bound by *Birkenhead Union* v. *Brookes* (2) to hold that the plaintiffs were entitled to recover. They therefore reversed the judgment of the county court judge and gave judgment for the plaintiffs.

The defendant appealed.

Vaughan Williams K.C. and *Gwyn Rees* for the appellant. The reasoning in the judgment of Salter J. is conclusive in favour of the appellant. It is clear that, but for *Birkenhead*

(1) [1926] 1 K. B. 567. (2) 95 L. T. 359.

Union v. *Brookes* (1), the Divisional Court would have decided accordingly. There was no object in passing s. 29 of the Poor Relief Act, 1819 (now repealed), or s. 58 of the Poor Law Amendment Act, 1834, which enabled overseers to give relief by way of loan only, or art. 13 of the Relief Regulation Order, 1911 (2), which regulates the granting of relief so given, if a right to recover already existed at common law. Where the recipient is suffering from delirium tremens, as in *West Ham Union* v. *Pearson* (3), or is an infant, as in *In re Clabbon* (4), and so is incapable of contracting on his own account, there may be reason for holding that those who administer relief to him should have a right to recover; but it does not follow from those cases that relief given to a person who has full capacity to contract and does not do it, is also recoverable. Yet those cases are said to support *Birkenhead Union* v. *Brookes*. (1) In other words it is unsupported. It was nevertheless binding on the Divisional Court. But this Court has full power to overrule it, and *St. Mary Islington Union* v. *Biggenden* (5), which followed it.

Montgomery K.C. and *Stanley Evans* for the respondents. *Birkenhead Union* v. *Brookes* (1) has been regarded as law for twenty years; it has been approved in *St. Mary Islington Union* v. *Biggenden* (5), and much money has been recovered by guardians on the strength of it. If this Court is in any doubt concerning its soundness it will not overrule a decision of this standing. Admittedly guardians can recover in respect of relief given to an infant or a lunatic because of their inability to contract, and on the ground that those who relieve them do so as agents of necessity; and it is sought to distinguish the present case on the ground that

(1) 95 L. T. 359.

(2) Relief Regulation Order, 1911 (Statutory Rules and Orders No. 1295 of 1911), art. 13: "No relief which may be contrary to the Regulations contained in this order shall be given by way of loan; but any relief which may be given to, or on account of, any person above the age of twenty-one, or to his wife, or any member of his family under the age of sixteen, in accordance with those Regulations, may, if the guardians think fit, be given by way of loan."

(3) (1890) 62 L. T. 638.

(4) [1904] 2 Ch. 465.

(5) [1910] 1 K. B. 105.

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the appellant is capable of contracting and free to contract; but what freedom or capacity to contract has a man whose only choice is between relief and starvation? If capacity to contract is the test, the principle which applies to the infant might well be applied to him, as it was applied by Bray J. in *St. Mary Islington Union* v. *Biggenden*. (1)

Counsel for the appellant were not called upon in reply.

BANKES L.J. The Divisional Court considered themselves bound by *Birkenhead Union* v. *Brookes* (2) to overrule the county court judge. This Court has power to review that decision. Mr. Montgomery has appealed to us to uphold it, not because it is right, but because we ought to hesitate before we overrule a decision which has stood for law for a long time. No doubt that is a matter which the Court always takes into consideration, and probably that case has been acted upon, though it has never found its way into the Law Reports. The facts of the present case are that guardians granted relief to a man and his family. He was of full age and capacity. The guardians were under the impression that they were granting the relief by way of loan, and they brought an action in the county court to recover the amount advanced. Having failed to establish that the relief had been granted by way of loan, they fell back on an alleged obligation at common law upon the recipient of relief to repay the amount received. Whether they founded that obligation on the suggestion that the person was in a position to repay or not we do not know. The contention was simply that the appellant, although of full age and ability to contract, was under an obligation like that which binds a person to repay money advanced on his behalf by an agent of necessity. Apart from the cases to be dealt with presently, I think there is no foundation for this suggestion. Guardians of the poor are under a statutory duty to afford relief to indigent persons. The relief was properly granted in circumstances justifying the application. The statutes themselves provide for recovering payment in particular cases; in certain circumstances it

(1) [1910] 1 K. B. 105, 111. (2) 95 L. T. 359.

may be recovered from relatives, and in others the guardians may grant relief by way of loan and recover summarily the money so advanced. This power was first introduced by the Poor Relief Act, 1819 (59 Geo. 3, c. 12), since repealed and replaced by the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 58, and it has been regulated by art. 13 of the Relief Regulation Order, 1911, which provides that no relief contrary to the regulations contained in the Order may be given by way of loan, but in the cases mentioned in that article relief may be so given. If the guardians are intending to grant relief by way of loan, it is for them to make it plain at the time of granting it that it is being so granted. This can easily be done by granting it upon the terms of a written form or of a paper stamped with a rubber stamp. Therefore the inference to be drawn from the statutes is irresistible that the guardians have no right to recover payment unless they have granted the relief by way of loan, or unless the special circumstances exist which make it recoverable from relatives.

We have been referred to certain authorities which are well grouped by Bray J. in his judgment in *St. Mary Islington Union* v. *Biggenden*. (1) "In my opinion," said the learned judge, "the liability of the defendant is the same as the common law liability of a person, such as an infant or the like, who is not able to contract for necessaries supplied to him. The liability of such a person seems to me to have been laid down by Farwell J. in *In re Clabbon* (2) and by Fry L.J. and Mathew J. in *West Ham Union* v. *Pearson* (3), and was applied by Ridley and Darling JJ. in *Birkenhead Union* v. *Brookes* (4) to the case of a pauper who had capacity to contract." The last of those cases is the one on which Mr. Montgomery relies. He says it is on all fours with the present case and that he ought to succeed unless we are prepared to overrule that case. In my opinion there is no authority on which that case can be supported; no statute affords any ground for it, and in so far as the common law

(1) [1910] 1 K. B. 105, 111.
(2) [1904] 2 Ch. 465.
(3) 62 L. T. 638.
(4) 95 L. T. 359.

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is concerned there is no pretence for applying principles or doctrines of agency of necessity to relief given to a person of full age and capacity to contract. Therefore I am of opinion that *Birkenhead Union* v. *Brookes* (1) should be overruled. About *West Ham Union* v. *Pearson* (2) and *In re Clabbon* (3) I do not propose to say more than is necessary. In both cases the Court thought the facts warranted the application of a principle of the law of agency, and treated the person who supplied necessaries as if he were an agent of necessity. In one of these cases the recipient was an infant; in the other a person who was temporarily insane. I desire to reserve my opinion upon the case of a person who is unable to contract, such as a lunatic or an infant, and even the case of a married woman. The decision in this case is upon the facts of this case, which are that the relief was granted to a man of full age and fully competent to contract. In these circumstances there is no ground for suggesting any obligation quasi ex contractu or otherwise to repay what is granted by way of relief. The appeal must therefore be allowed.

SCRUTTON L.J. If it were necessary in this case to give a considered opinion on all the questions suggested by the cases which have been referred to and concerning relief given to infants, lunatics, persons suffering from delirium tremens, and married women (who would probably resent their inclusion in this category), I should desire to consider my judgment further. But in this case the facts are that a man of full age, capable of making a contract but in poor circumstances, has applied to guardians for relief. The guardians are under a statutory obligation to afford him relief; and, there being a statutory method of granting relief by way of loan, so as to impose upon him an obligation to repay, they have not made use of it. The question is whether there is an obligation at common law upon a poor person, who has in these circumstances received relief, to repay, either when he has the means, or absolutely whether he has means or

(1) 95 L. T. 359. (2) 62 L. T. 638.
(3) [1904] 2 Ch. 465.

not, which is the obligation Mr. Montgomery prefers to insist on. The statutory obligation was first imposed in the year 1601 by an Act of Elizabeth which in the case of poor persons who had fathers, mothers, grandfathers, grandmothers, or children in a position to support them, contains machinery by which those relatives might be made to afford support before relief was granted. From 1601 to 1906 the world remained ignorant of the fact that there was at common law an obligation on the person who had received relief to repay what he had received. Lawyers were unaware of it; the decisions do not mention it, until in 1906 two judges of the King's Bench Division discovered a rule of the common law of which the profession for 305 years had been ignorant. It is but natural to regard this discovery with suspicion. If the Legislature had been aware of this supposed obligation to repay there was no need to enact in 1834 that relief might be granted by way of loan. The obligation cannot be founded on a contract to repay implied from the recipient's consent to terms of repayment, for it is common ground that there was no question of consent; and as to terms there were no express terms of repayment, and none could be implied where the guardians were acting under a statutory duty to afford the relief, which prima facie negatives any condition for repayment. It was suggested that if the expression "implied contract" is not appropriate, an "implied obligation at common law" may be more apt. But where a statute imposes on one person a duty to pay money to another I am unable to infer any obligation at common law to repay the money. It might be easier to infer such an obligation conditionally upon the recipient having means to repay, but I agree with Mr. Montgomery that it would be very difficult to find a conditional obligation of that nature implied at common law, however reasonable it might be for Parliament to impose such an obligation if it thought fit so to enact.

Now so far as the authorities are concerned there are two cases decided in the same year. In one of them, *West Ham Union* v. *Pearson* (1), the recipient was suffering from

(1) 62 L. T. 638.

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delirium tremens and incapable of contracting at the time, and the relief was necessary for him in his unprotected state. The other was *In re Rhodes* (1), where relatives voluntarily contributed to the support of a lunatic and were held not entitled to recover, because they had never intended the money as a loan but as a voluntary contribution to assist a relative. The Court of Appeal expressed the view, though it was not necessary to do so, that if the relatives had intended to advance the money as a loan there might have been an obligation on the lunatic's estate to repay. But in each of these cases the recipient was not in a position to contract himself, and so it was possible to invoke the doctrine of agency of necessity, one of the conditions of which is that the agent is unable to communicate with the principal. Following those two cases came *In re Clabbon*. (2) That was the case of an infant. An infant is liable for necessaries. The old course of pleading was a count for goods sold and delivered, a plea of infancy, and a replication that the goods were necessaries; and then the plaintiff did not necessarily recover the price alleged, he recovered a reasonable price for the necessaries. That does not imply a consensual contract. The infant not being able to contract, it was possible in that case also to introduce the doctrine of agency of necessity. I do not wish to express any opinion upon the validity of these decisions. In my view it is not necessary to do so. But then came *Birkenhead Union* v. *Brookes* (3), a case which is on all fours with this case and in which a Divisional Court applied the reasoning of the three cases I have mentioned to a different state of facts, where the pauper was of full age and capable of contracting and there was a statutory obligation upon the guardians to relieve him apart from his assent. That case seems to me to have taken a step beyond any of the former cases, because there it could not be said that necessaries had been supplied to a person who was incapable of making a bargain about them. He was in a position to make such a bargain and the guardians

(1) (1890) 44 Ch. D. 94. (2) [1904] 2 Ch. 465.
(3) 95 L. T. 359.

might have made a bargain with him by way of loan. In the present case the guardians did not perform the statutory conditions necessary to enable them to afford relief by way of loan. How are we to regard the case? The county court judge considered the authorities and ignored them. With all respect I think that is not a proper attitude for a judge to assume towards the decisions of a superior Court. He may express his own opinion that they are wrong, provided he does so in respectful terms, but he is not at liberty to differ from them because he thinks they are wrong. The Divisional Court took the proper course. Salter J. stated his reasons for the difficulty he found in understanding the earlier decisions and, having pointed out in what respect he questioned their soundness, said he was bound to follow them and to leave it to the Court of Appeal to deal with them, and I have been much assisted by the judgment of that learned judge in considering the earlier cases and coming to a conclusion upon the case before us. Mr. Montgomery suggested a third course—namely, to apply some principle of prescription or something like a Statute of Limitations to a decision which has stood for twenty years. I cannot apply that principle here; for, though I am well aware that in doubtful cases the Courts attach some importance to the fact that a decision has stood unchallenged for a considerable time, I am equally well aware that neither the House of Lords nor this Court has had the slightest compunction in overruling cases of longer standing than any we have now to consider, if, when the soundness of those cases is questioned, the superior Court is of opinion that they are not law. In my opinion the decision in *Birkenhead Union* v. *Brookes* (1) was wrong. Where a recipient of relief was of full age and capable of contracting, and guardians, fulfilling their statutory obligation to give him relief, have not used the statutory machinery by which they could grant that relief by way of loan, I can see no reason why it should be held that there is an implied obligation at common law on the recipient to repay whether he has means or not. The Divisional Court

(1) 95 L. T. 359.

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has decided on the authority of a previous decision that there is such an obligation ; in my opinion that decision was wrong ; we are not obliged to follow it, and I think it should be reversed and that judgment should be entered for the appellant.

ATKIN L.J. The appellant was a collier who during a strike in the year 1921 applied for relief for himself and his family, and obtained it for three weeks in the form of an order signed by the relieving officer addressed, I suppose, to a local tradesman : " Please deliver the under mentioned articles to the value of 35*s*. to Samuel Drew and charge the same to my account. W. H. Daniel, Relieving Officer." The wording in the schedule is " Drew, 35*s*." For the next week the sum was the same, and for the next week it was 25*s*. After that, in the month of June for four consecutive weeks he received the sum of 7*s*. 6*d*., which was intended to supply extra nourishment for his wife, who was ill, by orders addressed in the same way to another tradesman to supply goods to the value of 7*s*. 6*d*. The appellant was and is an adult and in full possession of all his faculties. It is now suggested that when he obtained relief he became at once under an obligation to repay the guardians the sums they paid upon those orders. It appears to me that there is no foundation at law for that proposition. The guardians administer relief under Acts for the relief of the poor beginning with the statute of 43 Eliz. c. 2. I think it is material to remember that the terms of the statute of Elizabeth were that overseers shall be appointed, that they shall take order from time to time for setting to work the children of those parents who cannot maintain them and for setting to work all persons married or unmarried having no means to maintain them and use (*sic*) no ordinary and daily trade of life to get their living by. That is why there is the obligation to work, and hence, I fancy, a word which is now disappearing, " work-house." Then the Act proceeds : " And also to raise weekly or otherwise (by taxation of every inhabitant . . . . in such competent sum and sums of money as they shall think fit) a convenient stock of flax, hemp, wool, thread, iron, and

other necessary ware and stuff, to set the poor on work "; . . . . and then come these words: "And also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor, and not able to work, and also for the putting out of such children to be apprentices . . . . and to do and execute all other things . . . . as to them shall seem convenient." The proposition of law is that from the date of this Act, when the overseers provided "competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor, and not able to work," there was at once imposed an obligation upon each of the lame, the impotent, the old, the blind, and such as were poor and not able to work, to repay the guardians the sums of money which they got by way of relief; that the guardians, after giving relief for a certain time, could have sued the lame, the impotent, the old, and the blind, could have attached them under mesne process and put them in prison until they paid or until the case had come on, and, after having got judgment for the debt, could have seized them under a capias and kept them in prison until they paid it. That seems an extraordinary proposition and one which is not warranted in law. The object of the statute negatives the idea of any contractual obligation upon persons receiving poor relief to repay what they have received when they had means to do so, and in my opinion Mr. Montgomery was quite right in not arguing that there was such an obligation at common law. With great respect to the judges of the Divisional Court in *Birkenhead Union* v. *Brookes* (1) the judgment of that Court, which is based upon the view that there is such an obligation, seems to me to be wrong. It was probably based on a misapprehension of a statement by a very learned lawyer, which as reported seems to me to be too wide. In *West Ham Union* v. *Pearson* (2), where a person suffering from delirium tremens had been removed, by order of the relieving officer, to the workhouse where he was kept for some days, and the guardians sought

(1) 95 L. T. 359. (2) 62 L. T. 638, 639.

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to recover the expenses so incurred, Fry L.J., after stating the question to be whether the defendant was liable for expenses which had been properly incurred for his benefit, said: "I think he is so liable, and I base my decision, not upon the Lunacy Acts, but simply upon the common law liability on the part of the defendant to repay the expenses necessarily incurred for the benefit of the defendant himself." That proposition, with great respect, is too wide. There is no principle of law which compels a man to repay expenses necessarily incurred for his benefit, and clearly not when a statute has imposed an obligation upon a local authority to afford relief in circumstances which negative any contractual obligation to repay. No doubt special circumstances may render some adjustment proper and reasonable, for example, where a pauper comes into a fortune or a sufficient sum to enable him to repay the cost of his maintenance, and there are statutory provisions dating from the year 1849 (1) which meet that case by enabling guardians to recover a part of the expenses they have incurred, limited to one year's maintenance. This seems a somewhat strange provision if there was already a right at common law to recover the whole sum expended, subject to any question under the Statute of Limitations. But there is another power which was conferred on guardians as early as the year 1819, where a man had become destitute owing to special circumstances, but was able to work and was in the habit of squandering his money. In that case the guardians were empowered (2) to advance relief to him by way of loan, and then to summon him before justices and obtain an order upon him to repay such sums as they might have advanced, if there is likely to have been or ought to have been a reasonable surplus over his wages, and in default of payment to have him committed to prison. In the Act of 1834, which brought the administration of the poor law under a central authority, power was given to the Poor Law Commissioners to direct that certain relief should be given by way of loan, and s. 58 of that Act directs that

(1) The Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 16.
(2) 59 Geo. 3, c. 12, s. 29.

the relief so given shall be considered to be a loan. There is thus ample power given to the administrators of the poor law, enabling them to protect themselves and to give relief to persons who temporarily need it on terms that it shall be repaid when the recipients are able to repay it. That is said to be by way of loan, and there is a general order of the Local Government Board (now the Ministry of Health) enabling guardians to give outdoor relief in certain cases, if they think fit, by way of loan. This permissive power, which is not a power to direct that certain forms of relief are to be considered as given by way of loan, is in my opinion only a power in fact to grant a loan or to give relief by way of loan; and the conditions of a loan must be present; the lender must intend to lend and the borrower to borrow. If those conditions are present there is nothing to prevent relief from being granted by way of loan. In the present case the county court judge has found that the relief was not granted by way of loan; that though the guardians were of a lending mind the borrower was not of a borrowing mind, because he did not know that the relief was being offered to him by way of loan, and thought he was applying for it in the ordinary circumstances which, as I have said, negative the idea of his having to repay.

For these reasons I think the action fails. The county court judge was right in the result he arrived at, but I agree with my brother Scrutton that he was wrong in the way in which he arrived at it. He ought not to have ignored cases which were binding upon him and upon the Divisional Court, for it was his duty, as I think it was the duty of the Divisional Court, to follow those decisions and decide in favour of the guardians. In this case we are free to give effect to the view which both the county court judge and the Divisional Court thought to be the right view, and to enter judgment for the defendant.

Like my brothers, I do not desire to go further than is necessary, and I have confined my decision to the case of a person of full contracting capacity. In such a case it is impossible, where he has not contracted, to say that he must

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be regarded as under an obligation as if he had contracted. Therefore I say nothing concerning the position of a lunatic, or an infant, or any one else under a disability, except that it would surprise me if an infant or a lunatic were found to be in a worse position and under a more onerous obligation in relation to the poor law than an adult of sound contracting mind. That point, however, we may reserve for future consideration, if it ever arises for decision.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Warren & Warren, for Edward Roberts, Dowlais.*

Solicitors for respondents: *Wrentmore & Son, for Spickett & Sons, Pontypridd.*

W. H. G.

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May 6.

CLARKE *v.* GRIFFITHS.

PEACOCK *v.* SAME.

Licensing—Club—Additional unregistered Premises—Supplying intoxicating Liquor—"In a club"—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 94.

By s. 94 of the Licensing (Consolidation) Act, 1910, "Intoxicating liquor shall not be supplied in a club for consumption off the premises except to a member on the premises; and, if any person supplies or obtains any intoxicating liquor in contravention of the provisions of this section, he shall be liable to" a penalty.

A club registered under s. 91 of the Act took a lease of some additional premises situated at a considerable distance from the club premises. The additional premises were never registered, but the ordinary business of a club was carried on there. The steward of the club supplied a member with intoxicating liquor on the additional premises, and the member consumed it there. Upon an information charging offences under s. 94:—

Held, that the liquor had not been supplied or obtained "in a club," and that therefore the provisions of the section had not been contravened.

CASE stated by justices for the county of Glamorgan.

An information was preferred by the respondent under the

Licensing (Consolidation) Act, 1910, s. 94, against Gearth Peacock and Harry Clarke, the appellants, charging that on December 5, 1925, at the parish of Llanfabon, Gearth Peacock, being then the steward of the Llanbradach Workmen's Social Club and Institute, Ld., whose registered address is 1 and 2 Station Road, Llanbradach, unlawfully did supply certain intoxicating liquor, to wit, beer, for consumption off the premises to Harry Clarke otherwise than on the premises, to wit, at premises occupied by the club at the rear of High Street, in Llanbradach, and that Harry Clarke at the same time and place unlawfully did obtain the said liquor contrary to s. 94 of the Licensing (Consolidation) Act, 1910.

The information was heard by the justices on December 22, 1925, when the following facts were proved or admitted: the Llanbradach Workmen's Club and Institute, Ld. (hereinafter called "the said club"), which had its registered address at 1 and 2 Station Road, Llanbradach, was a club registered under the Industrial and Provident Societies Act, 1893, and for some years the club had occupied the said premises. The club was registered pursuant to s. 91 of the Act of 1910. In August, 1925, the club took a lease of additional premises known as the Old Workmen's Hall, High Street, Llanbradach, which was at a considerable distance from the club premises. For some years the hall had been occupied by the Llanbradach Ex-Servicemen's Club and Institute, Ld., which had been registered pursuant to s. 91 of the Act of 1910, but on May 26, 1925, the justices struck it off the register, and ordered that the premises should not be used for the purposes of any club which required to be registered under the Act for a period of three months from May 26, 1925. On August 26, 1925, the secretary of the Llanbradach Workmen's Club called at the offices of the clerk to the justices and tendered a fee for registering the Old Workmen's Hall as a branch club. Correspondence passed between the secretary and the clerk to the justices, but the premises of the Old Workmen's Hall were never registered under s. 91 of the Act of 1910 as premises of the said club.

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On October 3, 1925, the said club began to use the Old Workmen's Hall as club premises in addition to Nos. 1 and 2 Station Road, Llanbradach.

On December 5, 1925, the respondent, a superintendent of police for the district in which the premises are situated, visited the Old Workmen's Hall and found many members of the said club on the premises, and that the ordinary business of a club was being carried on there. There was no disorder or impropriety of personal conduct of any kind. The steward of the club, the appellant Peacock, in the presence of the respondent supplied the appellant, Harry Clarke, who was a member of the said club, with beer, for which the said appellant made payment, and there and then consumed the beer in the presence of the respondent.

The justices convicted the appellants but stated a case for the opinion of the Court whether they had come to a correct determination.

Roome for the appellants. The question is whether the Old Workmen's Hall was a "club" within the meaning of s. 94. It was not registered as a club in accordance with the provisions of s. 91, and the appellants could not properly be convicted under s. 94, although perhaps they might have been under s. 93. "Supply" in s. 94 means the handing over of the intoxicating liquor by the steward to the member, but it must be done "in a club." There is no finding that this liquor came from the premises in Station Road.

Wilfred Lewis for the respondent. The premises in High Street were "off the premises" of the club. There was a supply of intoxicating liquor in the club for consumption off the premises. In considering the nature of the supply, it is necessary to look to the mode of sale, and to see whether the supply originated with the club. Sect. 93 cannot apply to a member of a registered club, and, apart from s. 94, there would seem to be no section of the Act under which the appellants could have been convicted.

Roome replied.

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LORD HEWART C.J. [after stating the facts continued :] The case turns upon the true construction of s. 94 of the Licensing (Consolidation) Act, 1910. The part of the Act which is concerned with the registration of clubs begins at s. 91, and it is a little important to remember that s. 94 occurs in a part of the Act which exclusively relates to clubs, and which is not concerned with other matters arising out of the law of licensing. Sect. 91, sub-s. 1, provides : " The secretary of every club which occupies a house or part of a house which is habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, or any other premises which are habitually so used, and in which any intoxicating liquor is so supplied, shall cause the club to be registered in manner provided by this Act." And by sub-s. 2 : " The registration of a club under this Act shall not constitute the club premises licensed premises, or authorise any sale of intoxicating liquor therein which would otherwise be illegal." Sect. 92 contains provisions as to the mode of registration, and s. 94 provides : " Intoxicating liquor shall not be supplied in a club for consumption off the premises except to a member on the premises ; and, if any person supplies or obtains any intoxicating liquor in contravention of the provisions of this section, he shall be liable to a fine not exceeding ten pounds." The important words in the section are : " Shall not be supplied in a club for consumption off the premises." The case for the prosecution here was that the liquor was supplied in the registered club in Station Road for consumption off the premises, that is to say, in the other premises in High Street. The consumption took place in the premises in High Street, which were no part of the registered premises of the club. The question remains : Is it true to say that the liquor was supplied in the club premises in Station Road ? Mr. Lewis put forward an argument in which, if I could, I should gladly concur. He argued that in considering the nature of the supply, one must look, not only to the place of consuming or to the moment of consumption, but to the mode of sale, and whether the supply originated with the club. It is true that the sale

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Lord Hewart C.J.

was by the steward, and on premises which were described as additional premises of the club. Could the liquor be said to be supplied in the club? There is no finding whether the liquor was first delivered at the club in Station Road and then removed to High Street, or whether it was delivered direct to High Street, but however that may have been, the argument for the respondent involved the construing the words "in a club" as meaning "in or from the premises of a club." The legislation might be more complete if those words had been inserted, but I cannot think that the words used are sufficiently pregnant to bear that meaning. "In a club" means, I think, in the premises of a club, and in that sense this case bears some relation to *Watson* v. *Cully* (1), which was before this Court a few weeks ago. A clear antithesis is pointed in s. 94 between "in a club" and "off the premises." In the course of the argument it was suggested that if the appellants could not be convicted under s. 94, they could not have been convicted at all. Even if that were so, it would be no reason for reading into that section words which give it a meaning that, in my opinion, it ought not to bear. But Mr. Roome has conceded that there might have been a prosecution under s. 93. It is not necessary to consider whether there were not other means of punishing what was done in this case, as, for example, by a charge under s. 95, that the club was not being conducted in good faith as a club when it was supplying liquor to members in the High Street premises. On the question whether the conviction under s. 94 should stand, I have come to the conclusion that it cannot, and that we must allow this appeal.

AVORY J. I am of the same opinion. This conviction could only be supported by reading the words "in a club" as though they were "in or from a club." I can see no justification for doing that. The word "supply" is substituted for the word "sell" in other parts of the Act. It is really equivalent to "serve," and makes it impossible to construe the section in the wide sense contended for. I

(1) [1926] 2. K. B. 270.

express no opinion whether the facts found in this case would support a charge under s. 93 or any other section of the Act.

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SHEARMAN J. I am of the same opinion. I think it is clear that the words "in a club" mean in the club premises. It is only necessary to turn to s. 93 and other sections in order to make it plain that "supply" relates to members and "sell" to other persons, and the supply begins when the member orders the intoxicating liquor. If so, the appellants do not come within the provisions of s. 94.

Appeals allowed.

Solicitors for the appellants: *Helder, Roberts, Giles & Co., for W. R. Davies & Co., Pontypridd.*

Solicitors for the respondent: *Willis & Willis, for Gilling & Goodfellow, Cardiff.*

F. C.

[IN THE COURT OF APPEAL.]

C. A.

1926

June 21.

MORSE *v.* FROST.

Applied. NAGY *v.* CO-OPERATIVE PRESS, LTD. [1949] 1 All E.R. 1019.

[1926. M. 778.]

Practice—Setting down Action for Trial—Entering interlocutory Judgment—Action for personal Injuries—No Defence delivered—Payment into Court—Admission of Liability—Amount of Damages—"Issue of Fact ready for trial"—Rules of Supreme Court, Order XXVII., *r.* 4; *Order* XXXVI., *r.* 11.

Where in an action for unliquidated damages the defendant makes default in delivering his defence and pays money into Court admitting liability, but not the amount claimed, the plaintiff is not compelled to enter an interlocutory judgment under Order XXVII., r. 4, but may under Order XXXVI., r. 11, give notice of trial and have the issue of the amount of damages tried in the ordinary way, this being an "issue ready for trial" within the meaning of that rule.

APPEAL from an order of Fraser J. affirming an order of Master Bonner, who dismissed the plaintiff's application to set down the action for trial before a judge and a common jury.

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The action was for personal injuries caused by the negligence of the defendant's servant whereby the plaintiff, an infant, lost his leg. He sued by his next friend and claimed damages, including 148*l.* 10*s.* special damage. On a summons for directions it was ordered that there should be a statement of claim and defence, and that the case should be tried in Middlesex with a common jury.

The statement of claim was delivered on March 22, 1926.

On March 26 the defendant paid into Court a sum of 650*l.* by way of satisfaction under r. 1 of Order XXII., and served on the plaintiff a notice under r. 4 of the same order specifying the fact that he had paid in that sum and the cause of action in respect of which he had done so. He delivered no defence. The plaintiff was not content with the amount paid in. On April 27 he gave notice of trial under Order XXXVI., r. 11 (1), and then applied to have the action set down for trial in Middlesex before a judge and a special jury. The Master dismissed the application on the ground that he had no power to make the order, as the case came within Order XXVII., r. 4. (1) Fraser J. affirmed the order of the Master.

The plaintiff appealed.

H. D. Samuels for the appellant. The Master and the learned judge were wrong in holding that the only course open to a plaintiff in a case like this, where large damages are claimed, is to enter an interlocutory judgment under

(1) Rules of the Supreme Court, 1883, Order XXXVI., r. 11: "Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any) whether it closes the pleadings or not; or . . . . where no order for a reply has been made under Order XXIII., on the expiration of four days after the defence, or the last of the defences shall have been delivered; or at any time after the issues of fact are ready for trial."

Order XXVII., r. 4: "If the plaintiff's claim be for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and the defendant, or all the defendants, if more than one, make default as mentioned in r. 2" [i.e., in delivering his defence], "the plaintiff may enter an interlocutory judgment against the defendant or defendants, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the Court

Order XXVII., r. 4. By Order XXI., r. 4, the amount of damages is in issue in all cases unless expressly admitted. In the present case the amount is not admitted, but remains an issue in the action: *Brown* v. *Feeney*. (1) It is an issue ready for trial. By Order XXXVI., r. 11, notice of trial may be given by the plaintiff at any time after the issues of fact are ready for trial. Furthermore the case falls within Order XXVII., r. 13. The statement of claim is the "last pleading delivered" and "all material statements of fact" therein are deemed to have been denied and put in issue.

Thorn Drury K.C. and *E. F. Lever* for the respondent. This case is within the very words of Order XXVII., r. 4. The claim is for pecuniary damages only, and the defendant has made default in delivering his defence. Then "the plaintiff may enter an interlocutory judgment against the defendant." When that has been done "a writ of inquiry shall issue." No doubt the Court may order the damages to be assessed in some other way, but such an order will only be made in very exceptional circumstances. Where no issue is raised except the amount of the damages the defendant should not be put to the expense of a trial before a judge and jury in the High Court. The case is not one within Order XXVII., r. 13, because the amount of damages is not a material statement of fact in the pleadings: Order XXI., r. 4. The question of amount is not such an issue as is contemplated by Order XXXVI., r. 11.

BANKES L.J. This case raises a short point of some importance. The plaintiff brought an action for personal

or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or judge may direct."

Rule 13: "Where no reply or subsequent pleading is ordered, then, at the expiration of four days from the delivery of the defence or last pleading delivered; or, where a reply or subsequent pleading is ordered, but the party who has been ordered or given leave to deliver the same fails to do so within the period limited for that purpose, then, at the expiration of the period so limited, the pleadings shall be deemed to be closed and all material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue. . . . ."

(1) [1906] 1 K. B. 563.

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injuries caused by the negligence of the defendant's servant. In his statement of claim he set out various heads of special damages and claimed nearly 150*l.* in respect of them. The defendant before delivering his defence paid 650*l.* into Court with a notice under Order XXII., r. 4. The plaintiff took that money out of Court. The defendant never delivered any defence. The question is what are the plaintiff's rights in these circumstances. No doubt he may enter an interlocutory judgment under Order XXVII., r. 4, and then either a writ of inquiry may issue or the Court or a judge may order that instead of a writ of inquiry the damages shall be ascertained in any way the Court or a judge may direct. The plaintiff has no desire to proceed in this way; he wishes to avoid the chance of an inquiry before the sheriff and wants to proceed to trial before a judge and jury. The defendant insists that the plaintiff cannot do this, and that the only course open to him is to enter an interlocutory judgment under Order XXVII., r. 4. The plaintiff claims an alternative right and points to Order XXVII., r. 13, and Order XXXVI., r. 11. It is not necessary to decide whether Order XXVII., r. 13, gives the plaintiff the alternative right he claims, because I think Order XXXVI., r. 11, does enable him to go before a judge and jury. That rule provides that notice of trial may be given with the reply, if any; or, where no reply has been ordered, on the expiration of four days after the defence; "or at any time after the issues of fact are ready for trial." In this case a statement of claim has been delivered, but there has been no defence; so the plaintiff may, if he likes, enter an interlocutory judgment; but he is not bound to do that, because, in my opinion, "the issues of fact are ready for trial" within the meaning of Order XXXVI., r. 11. The statement of claim raises issues which are not disposed of. The amount of the damages is in issue, and so are the facts on which the special damages are founded. But even if no special damages were claimed there would still be an issue, because, although liability is admitted in the absence of a defence, the amount of damages is still in dispute. The plaintiff is therefore entitled to have the

action set down for trial before a judge and a jury, and in my opinion it should be tried before a common jury.

ATKIN L.J. I am of the same opinion. The Rules of Court do not provide that, where a defendant pays money into Court before defence, admitting liability but not the amount of the damages, the only course open to the plaintiff is to enter an interlocutory judgment under Order XXVII., r. 4. He may continue the action in the ordinary way, entering it and setting it down for trial and having the issue as to damages tried under Order XXXVI., r. 11. That might in some cases be an unreasonable course to take, and if the judge who tries the case thinks it is and that the plaintiff has exposed the defendant to unnecessary expense, he may make such an order for costs as will be just and reasonable. But where damages are at stake to the very considerable amount claimed in this action, the case may properly be tried before a judge and jury in open Court. In applying to have this case set down for trial the plaintiff was within his rights. The appeal must be allowed.

SARGANT L.J. I agree.

Appeal allowed.

Solicitor for appellant: *W. C. Crocker.*
Solicitor for respondent: *A. E. Pratt.*

W. H. G.

Observations of BANKES AND SCRUTTON, L.JJ., at pp. 240, 243, *applied.* WARREN *v.* HENLYS, LTD. [1948] 2 All E.R. 935.

C. A.
1926
June 11.

[IN THE COURT OF APPEAL.]

POLAND *v.* JOHN PARR AND SONS.

Negligence—Master and Servant—Liability of Master for Act of Servant—Implied Authority—Emergency—Suspicion of Theft—Reasonable Belief—Servant's Duty with Respect to Master's Property.

A servant has implied authority to make reasonable efforts to protect and preserve his master's property in cases of emergency endangering it. For acts done by the servant within the scope of that authority the master is responsible. The servant's acts may exceed the authority. Whether they do or not is a question of degree.

A carter in the employment of the defendants on his way home in the middle of the day was following close behind a waggon laden with sugar in bags and being driven by one of his employers. He saw a boy walking beside the waggon with his hand upon one of the bags. Honestly and reasonably thinking that the boy was stealing sugar from the bag, he gave him a blow with his hand on the back of the neck. The boy fell and the wheel of the waggon injured his foot:—

Held, that in the circumstances the carter had implied authority to make reasonable efforts to protect and preserve the defendant's property; that the violence exerted was not so excessive as to take his act outside the scope of the authority, and that the defendants were liable.

APPEAL from the judgment of the Court of Passage of the City of Liverpool in an action tried before the judge of the said Court (Sir W. F. K. Taylor) sitting without a jury.

The plaintiff was a boy of twelve years old suing by his father as next friend. The action was for damages caused by the negligence of the defendants' servant.

The defendants were cartage contractors carrying on business at 4 and 6 Fowler Street in the city of Liverpool. The firm consisted of John Parr and Henry Parr, his son. On June 30, 1925, Henry Parr was conveying in a waggon five tons of sugar in fifty bags of 2 cwt. each from Tate's warehouse in Love Lane to Everton. He started with two horses, but required a third to draw the waggon up Sleepers Hill. At the bottom of Netley Street Arthur Hall, a carter in the defendants' employment, brought the third horse, and Henry Parr then proceeded with the third horse harnessed to the waggon. He was leading the middle horse by the head

and the front horse by a side rein. From thenceforth the waggon and horses were in the sole control of Henry Parr, but Arthur Hall on his way to his own home to get his dinner continued walking close to the waggon. About twenty minutes later, a little after twelve noon, the waggon, with Hall still following close behind, was proceeding along Walton Lane, which also led to the defendants' place of business, where Henry Parr intended to call on the way to Everton.

The plaintiff with two other boys having just left a neighbouring school, was walking home along Walton Lane in the same direction as the defendants' waggon, which was being driven at a walking pace with its near wheels close to the edging stones of a tramway running along and slightly raised above the general level of the lane. There was no footpath at the near side of the waggon, but the tramway forms a sort of kerb. Arthur Hall noticed the plaintiff walking along the tramway with his hand upon one of the bags of sugar. The learned judge found that the plaintiff was not stealing the sugar; but Hall, honestly believing that the plaintiff was tampering with the sugar, and with the sole object of protecting his masters' interest, struck the plaintiff with his open hand on the back of the neck. The plaintiff fell forward and the back wheel on the near side of the waggon went over his right foot. As a result his leg had to be amputated.

The learned judge in the course of his judgment said "It is quite clear that Hall was at that time in the employment of the defendants, but he was in their employment as a carter, and I think the failure in this case, the point on which the plaintiff must fail, is that Hall's employment being that of a carter, he was not at that time acting in the course of that which he was employed to do, nor was he doing any act which can be said to be incidental to that employment." He distinguished *Limpus* v. *London General Omnibus Co.* (1); *Ward* v. *London General Omnibus Co.* (2); and *Lloyd* v. *Grace, Smith & Co.* (3) on the ground that in those cases the

(1) (1862) 1 H. & C. 526. (2) (1873) 42 L. J. (C. P.) 265.
(3) [1912] A. C. 716.

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servants or agents were at the time of the wrongful act discharging duties connected with their employment, and continued: "The servant Hall in this case in his ordinary employment was a carter. [His duty was] to drive horses, to control the waggons and conduct them from place to place and load and discharge them, or help in something of that kind. The last act he had done incidental to his employment was done some considerable [number of] minutes before, when he handed over the third horse to one of the defendants. He did not then cease to be in the defendants' employment, but he was not then discharging any duties as a carter. . . . . The blot, the failure in this case is that he was not then in fact acting in the course of his employment . . . . nor was he doing an act incidental to it. It is true he did the act in the interests of his masters, and in that sense for their benefit. I do not think that was enough, and I think that the real foundation of liability in all these cases is absent." He therefore gave judgment for the defendants. He was then asked to assess the damages in the event of an appeal, and he assessed them at 500*l*.

The plaintiff appealed.

Merriman K.C. and *Goldie* for the appellant. The learned judge was wrong in holding that merely because the carter Hall was off duty at the time therefore he owed no duty towards the respondents and had no implied authority from them. A servant has in case of emergency a duty to take reasonable steps to protect and preserve his master's property if he has reason to believe it is in danger: *Rees* v. *Thomas*. (1) Being under that duty, it follows that he has an implied authority to take such steps as are reasonable. It may be that if he had struck the plaintiff with the object of punishing him the act would have been beyond the scope of this authority: *Abrahams* v. *Deakin* (2); *Radley* v. *London County Council* (3); but here he was plainly acting to prevent the sugar from being stolen, and so his act was within the

(1) [1899] 1 Q. B. 1015. (2) [1891] 1 Q. B. 516.
(3) (1913) 109 L. T. 162.

authority. This authority is unaffected by the fact that the servant is not expressly employed to guard his master's property, but is usually employed in some other branch of his master's business: *Rees* v. *Thomas* (1); *Culpeck* v. *Orient Steam Navigation Co.* (2) And surely it does not cease where a servant, usually employed in a service which does involve guarding his master's property, is momentarily off duty. The implied authority continues, and it is not enough for the master, by way of exculpating himself from liability for the servant's act, to plead that the act was excessive, or even criminal: *Dyer* v. *Munday.* (3)

[Salmond on Torts, 6th ed., 1924, pp. 100, 101, was also cited.]

Eastham K.C. and *F. A. Sellers* for the respondent. The authority relied on in this case is an implied authority to be inferred from all the circumstances. Authority from a master to do a particular act can only be implied where the act is one which in the circumstances might have been legally done by the master himself: *Poulton* v. *London and South Western Ry. Co.* (4); *M'Namara* v. *Brown.* (5) The fact that the act is done on an emergency is not enough to bring it within the class of acts done within the scope of the servant's employment: *Houghton* v. *Pilkington* (6); Smith's Leading Cases, 12th ed., 1915, vol. i., p. 409, notes to *Armory* v. *Delamirie.* (7)

Counsel were not called upon in reply.

BANKES L.J. This appeal from the Court of Passage in Liverpool raises an interesting point. The action was brought by a boy who lost his leg in the way I am about to explain. The defendants, who are the respondents, are master carters. One of them was himself engaged in carting sugar in bags along the streets of Liverpool. He brought the loaded waggon with two horses to a point, to which he had ordered his man Hall to bring a third horse that it might

(1) [1899] 1 Q. B. 1015.
(2) (1922) 15 B. W. C. C. 187.
(3) [1895] 1 Q. B. 742.
(4) (1867) L. R. 2 Q. B. 534.
(5) [1918] 2 I. R. 215.
(6) [1912] 3 K. B. 308.
(7) (1722) 1 Str. 505.

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be attached to the waggon to take the load up a hill. The third horse was then attached, and the defendant Henry Parr continued in charge of the waggon, leading the front horse by a driving rein and the second horse by the head. Hall having handed over the third horse was going home to his dinner following close behind the waggon. Boys often take the opportunity of pilfering when waggons laden with sugar are passing along the streets. The plaintiff, who had just come out of school, was walking alongside the waggon with his hand on a bag of sugar. Hall thought he was pilfering or about to pilfer, and he had reasonable grounds for so thinking, though in fact the plaintiff was not pilfering nor thinking of pilfering. Hall came up behind the boy and gave him a cuff on the neck. The boy fell and the waggon went over his foot. In these circumstances the learned judge gave judment for the defendants. The plaintiff appeals.

This is one of those cases where the rule of law is easily expressed, but a difficulty is raised by the way in which it has been applied in certain cases. The rule of law is concisely stated in Salmond on Torts, 6th ed., 1924, p. 100 : " A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (*a*) a wrongful act authorized by the master, or (*b*) a wrongful and unauthorized mode of doing some act authorized by the master."

The respondents contend that what Hall did was done without their authority either directly expressed or indirectly to be inferred from the circumstances of the case. I cannot agree. As a general rule a servant has an implied authority upon an emergency to endeavour to protect his master's property if he sees it in danger or has reasonable ground for thinking that he sees it in danger ; and an implied authority is as good as an express authority. In *Bank of New South Wales* v. *Owston* (1) Sir Montague Smith based the opinion of the Privy Council on the ground that from the facts proved the jury might infer the necessary authority in the servant to do the act complained of. He said : " An authority to

(1) (1879) 4 App. Cas. 270, 290.

be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one." It is therefore a question of fact whether the circumstances exist upon which an emergency arises. There can be no doubt that the facts of this case amply warranted the judge's finding, that Hall honestly believed the plaintiff was tampering with the sugar, and that he struck the plaintiff with the sole object of protecting his master's interest. Obviously in these circumstances an emergency had arisen and Hall had implied authority to endeavour to prevent the plaintiff from doing what he honestly and reasonably believed he was doing—namely, stealing his employers' property. Counsel for the respondent argued on the authority of *M'Namara* v. *Brown* (1) that a master cannot impliedly authorize an act which he could not lawfully do himself; but, with all respect to the judges who decided that case, it is contrary to the decisions of our Courts, and particularly to the judgment of Lord Esher M.R. in *Dyer* v. *Munday*. (2) It was there suggested that the act complained of, although if reasonably done it might have been within the scope of the servant's employment, so as to make the master responsible for it, yet being a criminal act must necessarily be outside the range of acts for which a master is responsible. Lord Esher said: "Then it is suggested that if the excess complained of amounts to the commission of a criminal offence, that would take the

(1) [1918] 2 I. R. 215.

(2) [1895] 1 Q. B. 742, 746.

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case out of the rule which makes the master liable for the acts of his servant. But if we look at *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) and *Seymour* v. *Greenwood* (2), it appears that the acts complained of in both those cases were criminal acts. In neither case was the ground taken that because part of the excess was criminal the master was exempt from liability, and in view of that fact the proposition put before us will not hold good." That disposes of the argument for the respondent as it was put to us in this case. In deciding whether an act of a servant is one for which his master is responsible the act must be regarded from two points of view. First, was it merely a wrong method of doing an authorized act, in which case the master is responsible; and secondly, where the authority is not otherwise established but has to be inferred from the circumstances, was the act one which was done for the servant's own purposes and not in his master's interest? In the present case the act of Hall was done in his masters' interest, and though perhaps excessive yet it did not pass beyond the description of an unauthorized mode of doing an impliedly authorized act. For an act of this description the master is responsible. The judgment of the learned judge was therefore wrong; the appeal must be allowed and judgment must be entered for the plaintiff for the sum of 500*l.* assessed by the learned judge.

SCRUTTON L.J. I agree. The defendant Henry Parr was conducting a lorry with five tons of sugar along a street in Liverpool at an hour when the plaintiff and other boys were coming out of school. The plaintiff, according to one of his witnesses, had the palm of his hand on the corner of one of the bags "as if he was pushing the cart and trying to help the horses, you might say." Hall, the defendants' servant, thought otherwise. He said he saw the boy "by the side of the waggon sticking his finger in and taking sugar. There was a very small hole about an inch in diameter." He ran up and cuffed the boy on the back of the neck. The boy

(1) (1873) L. R. 8 C. P. 148. (2) (1861) 6 H. & N. 359; 7 H. & N. 355.

fell with his foot under the rear wheel on the near side. The boy, suing by his father as next friend, brought an action against the owners of the lorry, alleging that Hall was their servant and was acting within the scope of his employment. The learned judge has held that the plaintiff fails, because Hall was not at the time when he struck the plaintiff actually being employed to do any work connected with the lorry, but was on his way home to his dinner. From this decision the plaintiff appeals.

To make an employer liable for the act of a person alleged to be his servant the act must be one of a class of acts which the person was authorized or employed to do. If the act is one of that class the employer is liable, though the act is done negligently or, in some cases, even if it is done with excessive violence. But the excess may be so great as to take the act out of the class of acts which the person is authorized or employed to do. Whether it is so or not is a question of degree. It has been argued that an employer cannot be liable if the act of his servant is illegal or excessive. In my opinion *Dyer* v. *Munday* (1) negatives the first alternative. Lord Esher M.R. in that case put the question whether the act was or was not for the employer's benefit. That may be one test, but where excessive violence is charged another question must be considered—namely, whether the excess is such as to take the act out of the class of authorized acts. It was also argued that an employer could not authorize an act which he could not lawfully do himself. But in many cases employers have been held responsible for acts of their servants which if done by themselves would have been illegal.

In cases of emergency any servant is bound to take reasonable steps to protect his employer's property. In *Rees* v. *Thomas* (2) A. L. Smith L.J. said: "The deceased was acting in the interest of his master in an emergency which suddenly arose, and in which any one would, I should think, have tried to do the same thing. I think, therefore, that the accident arose out of his employment." The Lord Justice

(1) [1895] 1 Q. B. 742. (2) [1899] 1 Q. B. 1015, 1017.

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lays stress upon the act being done "in the interest of his master." That shows that an act is not placed beyond the scope of the servant's duty by the mere fact that it is not one of the class of acts which he is specially employed to do or that the time is not an hour at which he is ordinarily at work. If a chauffeur passing his employer's house saw that it was on fire, it would be his duty, or at any rate he would be authorized, to take reasonable steps to protect it from further damage. In the present case the man Hall, a carter in the employment of the respondents, saw his employers' waggon, with regard to which he had no special duty at the time, apparently being robbed by boys. He honestly and reasonably believed that his employers' property was being stolen. He took action either to prevent the theft or a repetition of it. Maybe his action was mistaken and maybe the force he used was excessive; he might have pushed the boy instead of striking him. But that was merely acting in excess of what was necessary in doing an act which he was authorized to do. The excess was not sufficient to take the act out of the class of authorized acts, and therefore the learned judge was wrong and the appeal must be allowed.

ATKIN L.J. I am of the same opinion. With great respect to the learned judge I think his judgment goes wrong where he says "The blot, the failure in this case is that he [Hall] was not then in fact acting in the course of his employment . . . . nor was he in fact doing an act incidental to it." The learned judge took the view that the servant was not doing an authorized act, because he was not doing an act of the class which was expressly authorized, and therefore his act could not be authorized. *Bank of New South Wales* v. *Owston* (1) shows that to be an erroneous view. The learned judge has not given enough weight to the consideration that a servant may be impliedly authorized in an emergency to do an act different in kind from the class of acts which he is expressly authorized or employed to do. Any servant is as a general rule authorized to do acts which

(1) 4 App. Cas. 270.

are for the protection of his master's property. I say "authorized," for though there are acts which he is bound to do, and for which therefore his master is responsible, it does not follow that the servant must be bound to do an act in order to make his master responsible for it. For example, a servant may be authorized to stop a runaway horse, but it would be hard to say that every servant was bound to do this, or that a servant commits a breach of his duty who refrains from doing so, or from extinguishing a fire. Some men may have the necessary courage to encounter such dangers, others may shrink from facing them. It cannot be said that all are bound to encounter them. Thus there is a class of acts which in an emergency a servant, though not bound, is authorized to do. And then the question is not whether the act of the servant was for the master's benefit but whether it is an act of this class. I agree that, where the servant does more than the emergency requires, the excess may be so great as to take the act out of the class. For example, if Hall had fired a shot at the boy, the act might have been in the interest of his employers, but that is not the test. The question is whether the act is one of the class of acts which the servant is authorized to do in an emergency. In the present case the man Hall was doing an act of this class—namely, protecting his masters' property, which was or which he reasonably and honestly thought was being pillaged. His mode of doing it was not, in my opinion, such as to take it out of the class. He was therefore doing an authorized act for which the respondents are responsible. The appeal must be allowed and judgment entered for the appellant.

Appeal allowed.

Solicitors for appellant: *Helder, Roberts & Co., for J. A. Behn, Liverpool.*

Solicitors for respondents: *Hyman Isaacs, Lewis & Co., for H. J. Davis, Liverpool.*

W. H. G.

Followed. RAMA CORPN., LTD. *v.* PROVED TIN & GENERAL INVESTMENTS, LTD. [1952] 1 All E.R. 554.

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July 1, 2, 5, 6, 22.

[IN THE COURT OF APPEAL.]

HOUGHTON AND COMPANY *v.* NOTHARD, LOWE AND WILLS, LIMITED.

Followed. RAMA CORP. *v.* PROVED TIN, ETC. [1952] 1 Q.B. 147

Followed. RAMA CORP. *v.* PROVED TIN, ETC. [1952] 2 Q.B. 147

Company—Contract made by Director on behalf of—Ostensible Authority of Director—Articles of Association—Power of Board to delegate Powers to single Director—Presumption of Delegation—Constructive Notice—Limits of Doctrine—Companies (Consolidation) Act, 1908, *Sch. I., Table A, art.* 91.

The doctrine of constructive notice operates adversely to a person who neglects to inquire; it does not entitle such a person to claim for his own advantage to be treated as having knowledge of the facts which inquiry would have disclosed.

The plaintiffs were a firm of fruit brokers. The defendants and the P. Co. were two companies engaged in the fruit trade. One M. L. was a director of both companies. By art. 28 of the articles of association of the defendant company the directors were empowered to "delegate to any managing director, local board, head manager, manager, attorney or agent any of the powers . . . . for the time being vested in the directors." The articles of association also incorporated Table A, by art. 91 of which the board of directors "may delegate any of their powers to committees consisting of such member or members of their body as they think fit." M. L. purported to make on behalf of the defendants an agreement with the plaintiffs that in consideration of the plaintiffs advancing a certain sum of money to the P. Co., the plaintiffs should have the right to sell on commission all the fruit imported both by the defendants and the P. Co., and that the plaintiffs should be entitled to retain the proceeds of sale of the defendants' fruit as well as of that of the P. Co. as security for the advance. M. L. had, in fact, no authority from the defendants to make such a contract. The plaintiffs, with the view of securing themselves against any such want of authority in M. L., required confirmation of the agreement by the defendant company itself. The secretary of the defendants accordingly wrote the plaintiffs a letter purporting to confirm the agreement on behalf of the defendants, and the plaintiffs, treating that as a sufficient confirmation, made the advance. The secretary had no authority to give such confirmation. The defendants subsequently repudiated the agreement as made without their authority. In an action for breach of that agreement, the plaintiffs claimed that M. L. or the secretary had ostensible authority, inasmuch as such an agreement might have been made by the board, and the plaintiffs were entitled to assume that the board had delegated their powers in that behalf to M. L. or to the secretary, under the articles of association. At the time that they made the advance the plaintiffs had no knowledge of the terms of the defendants' articles of association or that they incorporated Table A:—

Held, that, whether the agreement was to be treated as having been made by M. L. as an ordinary "director" of the defendant company, or by the secretary as "agent," or by the two combined, the plaintiffs were not entitled to assume that any authority to make it had been delegated to them by the board, and for the following reasons:—

(1.) Although a person who contracts with an individual director or servant of a company, knowing that the board of directors has power to delegate its authority to such an individual, may under certain circumstances assume that that power of delegation has been exercised and that he may safely deal with the individual in question as representing the company, he cannot rely on the supposed exercise of such power if he did not know of the existence of the power at the time that he made the contract.

(2.) There was something so unusual in an agreement to apply the money of one company in payment of the debt of another that the plaintiffs were put upon inquiry to ascertain whether the person or persons making the contract had any authority in fact to make it.

(3.) Per Sargant L.J. (in whose judgment Atkin L.J. concurred). Even if the plaintiffs had known of the existence of the express power of delegation they would not have been entitled to assume that it had been exercised in favour of M. L. or the Secretary to any greater extent than was to be inferred from the positions which M. L. and the Secretary respectively occupied or were held out by the company as occupying.

Judgment of Wright J. reversed.

APPEAL from judgment of Wright J.

Before 1920 George Wills & Sons, Ld., had long been importers of fruit from Australia, New Zealand and America. Another company, the Nothard and Lowe Fruit and Preserving Co. (hereinafter described as the "Preserving Co.") had done a large business as fruit sellers, but, except as regards produce from Nova Scotia, did not act as importers. In 1920 George Wills & Sons, finding that the Preserving Co. proposed to extend their business by importing fruit from other countries besides Nova Scotia, in order to avoid competition with them in their business as importers, entered into an agreement with the Preserving Co. to form a new company, the defendant company, which should do all the importing of fruit which either of the said two companies would otherwise do, with the exception of Nova Scotia apples, the importation of which was reserved to the Preserving Co. By that agreement George Wills & Sons were to finance the new company, and the Preserving Co. was to give it the benefit of its

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organization, including warehouse accommodation. The new company was registered as carrying on business at the Preserving Co.'s address in Tooley Street, and they both occupied the same office and employed the same staff. Of the defendant company four directors were appointed, Messrs. Braund and Walker as representing George Wills & Sons, and Messrs. Maurice Lowe and George Lowe as representing the Preserving Co. The conduct of the defendants' business was distributed between the said directors in the following manner: Mr. Braund concerned himself only with the shipping arrangements, Mr. Walker's share of the business was limited to the giving of advice relating to the buying and importing of fruit, while the business of dealing with the fruit after its arrival in this country, selling it and collecting the proceeds, was left to the two Lowes, and particularly to Maurice Lowe. By art. 19 of the defendants' articles of association Maurice Lowe was appointed chairman of the board of directors. By art. 28 "The directors from time to time, and at any time, may delegate to any managing director, local board, head manager, manager, attorney or agent, any of the powers, authorities and discretions for the time being vested in the directors." The articles of association also incorporated Table A, by art. 72 of which "The directors may from time to time appoint one or more of their body to the office of managing director or manager." Maurice Lowe was not appointed managing director under this article. And by art. 91, "The directors may delegate any of their powers to committees of such member or members of their body as they think fit."

In July, 1924, the Preserving Co. was in financial difficulty, and the Lowes approached the plaintiffs, who are a firm of fruit brokers carrying on business in Liverpool and London, with the object of getting assistance. On July 14 an interview took place between Mr. Dart, a partner in the plaintiff firm, and Maurice Lowe, when an agreement was orally made between them that the plaintiffs should advance to the Preserving Co. the sum of 20,000*l.* on the terms that the plaintiffs should be employed as selling

brokers of all the fruit imported both by the defendants and the Preserving Co., and should be entitled to retain and apply towards repayment of that advance 70 per cent. of the net proceeds of the sale of the defendants' fruit as well as of that of the Preserving Co., and that as further security for the advance the Preserving Co. should deposit with the plaintiffs the title deeds of their packing houses in Nova Scotia. On July 16 Mr. Dart wrote a letter to Maurice Lowe to confirm the oral arrangement and reduce its terms to writing. (1) At the same time, as he seemed to entertain a doubt whether Maurice Lowe had authority to bind the defendants, he added: "I should presume the arrangement with respect to Messrs. Nothard, Lowe & Wills would have to be subscribed to by them." On July 22 the plaintiffs received the following letter: "Dear Sirs,—We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on our behalf are to be placed by you in reduction of advances made to Messrs. Nothard & Lowe"—under which name the Preserving Co. were commonly known—"in the same proportions and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard & Lowe. We shall in accordance credit the proceeds of such sales against the advances above referred to. Yours faithfully, for Nothard, Lowe & Wills, Ld., A. V. Prescott, Secretary." On the same date A. V. Prescott, who was a director of the Preserving Co., as well as secretary of the defendants, wrote a letter to the plaintiffs enclosing a formal agreement expressed to be made between the Preserving Co. of the first part, Maurice Lowe, George Lowe, and A. V. Prescott, therein called "the guarantors," of the second part, and the plaintiffs, setting out the terms of the oral agreement of July 14, with the addition of an undertaking by the guarantors to be liable up to 10,000*l.* for the repayment of the advances, and by clause 6 undertaking jointly with the Preserving Co. that the plaintiffs should "be entitled to retain and apply in or towards the repayment of the said advances

(1) The letter is set out in the judgment of Bankes L.J.

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seventy per cent. of the net proceeds of the sale of goods sold by (the plaintiffs) on behalf of or as agents for Nothard, Lowe & Wills, Limited." Although the defendants were not made a party to the agreement as so reduced into writing, Mr. Dart was content with the above letter of Mr. Prescott in his character as secretary of the defendant company, as sufficient confirmation by the defendants of the oral agreement of July 14, and advanced the 20,000*l.* At the time of so doing he fully understood that the Preserving Co. and the defendants were distinct companies, and that the contract so confirmed by the defendants' secretary was made by Maurice Lowe as a director of the defendants. On October 22 the plaintiffs advanced 5000*l.* more to the Preserving Co., and on November 5 a further 6000*l.* under supplemental agreements similar in terms to the agreement of July 14, except that the plaintiffs were thereby entitled to retain the whole of the next proceeds of the sale of the defendants' fruit, and not merely 70 per cent. These latter agreements, which like the former were made between the plaintiffs and Maurice Lowe, were not in terms confirmed by the defendants' secretary. The plaintiffs proceeded to act upon the agreements, selling the defendants' fruit and applying the proceeds to the repayment of their advances, but in November, 1924, the defendants repudiated the agreements as having been made without their authority, and thereupon the plaintiffs commenced this action, in which they claimed to recover (inter alia) the sum of 338*l.* 10*s.* 6*d.*, being the balance alleged to be remaining due to them in respect to the transactions relating to the above sales. In addition to contending that the agreements were made with the authority of the defendants, they further alleged that the agreements had been acted upon for some months with the knowledge of the defendants, and that consequently they must be taken to have ratified them. The defendants counterclaimed for 21,158*l.* 3*s.* 11*d.* for conversion of their fruit. Wright J. held that the plaintiffs were entitled to deal with Maurice Lowe as the representative and plenipotentiary of the defendant company, and that it was immaterial

whether he was actually authorized to make the agreements or not. For they were justified in assuming that Maurice Lowe, although he was only an ordinary director and not a managing director, had authority to bind the defendant company by the bargain which it purported to make, even though they had in fact no knowledge of the terms of the defendants' articles of association or that they empowered the board to delegate their functions to a single director. He accordingly gave judgment for the plaintiffs on both claim and counterclaim.

The defendants appealed.

R. Fortune for the appellants. The doctrine of *Royal British Bank* v. *Turquand* (1), on which Wright J. relied—namely, that the persons dealing with a company are not bound to inquire into matters of the internal management of the company, such as the delegation of its powers by a board of directors to individual officials of the company—has no application to a case where the contracting parties are put on inquiry by reason of the unusual nature of the transaction. Here the alleged agreement by the defendant company to pledge its property as security for an advance to the Preserving Co. was so unusual as to disentitle the plaintiffs to rely on the above doctrine.

A. T. Miller K.C., *S. L. Porter K.C.* and *R. K. Chappell* for the respondents. The learned judge was right in holding that the plaintiffs were entitled to rely on the assumption that Maurice Lowe had the defendants' authority to make the agreements. The defendants' articles of association included Table A, and by art. 91 "The directors may delegate any of their powers to committees consisting of such member or members as they think fit," and in *In re Fireproof Doors, Ld.* (2), it was held under that article the board might delegate their powers to a committee of one. Under the Companies Act the articles of association is a public document, which is open to the inspection of any member of the public, and accordingly persons who have dealings with a registered

(1) (1856) 6 E. & B. 327. (2) [1916] 2 Ch. 142.

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company must be taken to have constructive notice of the articles: Palmer's Company Law, 12th ed., p. 43. It is not essential for the party dealing with the company to prove that he had studied the articles; it is enough that if he had done so he would have been entitled to assume that the board had exercised the power which the articles conferred. The company will be bound if the director could have had the authority to make the contract sued on. Here Maurice Lowe could have had the authority, for the board had power to give it to him, and whether they had exercised that power or not was a matter of internal management into which the plaintiffs were under no obligation to inquire. This is the basis on which the rule in *Royal British Bank* v. *Turquand* (1) proceeds. That was an action by a bank against the official manager of a company on a bond. Plea, that by the registered deed of settlement of the company the directors could only borrow on bond such sums as should be authorized by a general resolution of the company, and averment that no such resolution was ever passed. On demurrer the plea was held bad. But there was no suggestion that the plaintiffs knew the provisions of the deed of settlement, and that knowing them they relied on their having been acted upon. The same observation applies to *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (2) There the directors of a company had power under the articles to fix the number of directors who should form a quorum. By resolution they fixed the number at three. A meeting of directors at which only two were present authorized the secretary to affix the company's seal to a mortgage, which was done. It was held that as between the company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid, though there was nothing to show that the mortgagees had any knowledge of the articles. Indeed in none of the cases in which it was held that the person dealing with a company was entitled to assume that the director or other official of the company had the authority which he purported to have did the judgment proceed on the basis that the party had in

(1) 6 E. & B. 327. (2) [1895] 1 Ch. 629.

fact studied the public documents. The party must for all purposes be treated as if he had read them; and this is what Lord Hatherley meant in *Mahony* v. *East Holyford Mining Co.* (1), when he said that the articles of association and the partnership deed are open to all who are minded to have any dealings whatsoever with the company, and "those who so deal with them must be affected with notice of all that is contained in those two documents."

[SARGANT L.J. The doctrine of constructive notice is not a positive doctrine, but a negative one operating against a person who has not inquired.]

There was nothing in the impugned transaction which was suspicious or ought to have put the plaintiffs on inquiry All the five brokers who were called said that they saw nothing unusual in the matter. The magnitude of the advance was not exceptional, it being most usual in the case of the large companies to make a substantial advance at the beginning of the season. The best test whether an action is extraordinary is whether it is done by others in the same business. The matter must be looked at from the point of view of the commercial man, not of the lawyer. As Lord Hatherley said in *Mahony* v. *East Holyford Mining Co.* (1), with reference to the duty to inquire, "All those ordinary inquiries which mercantile men would, in the course of their business make, I apprehend, would have to be made on the part of the persons dealing with the company," but nothing more. If the plaintiffs did not rely on the authority of Maurice Lowe to bind the defendants but on Mr. Prescott's letter of confirmation, they were entitled to assume that the directors had delegated their power to make the agreements to the latter as their "agent" within the meaning of art. 28, and for the same reasons that applied to the case of Maurice Lowe.

In the next place if neither Maurice Lowe nor Mr. Prescott had any original authority to make the agreements they acquired it by ratification. The defendant company, through its proper officers, acted upon the agreements for some six months. By that course of dealing they ratified their

(1) (1875) L. R. 7 H. L. 869, 893, 895.

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officials acts. In *Reuter* v. *Electric Telegraph Co.* (1) the deed of settlement of the company required contracts above a certain value to be signed by three directors or sealed with the company's seal under the authority of a special meeting. The plaintiff sued on an agreement above the prescribed value, which did not satisfy either of the above conditions, being made by parol with the chairman; but it was recognized, in correspondence with the secretary, and the plaintiff did work under and received payments by cheques for it, which payments passed into the company's accounts and were audited and allowed. It was held that those facts, which are very similar to those in the present case, amounted to ratification and bound the company.

Fortune in reply.

Cur. adv. vult.

July 22. The following written judgments were delivered :—

BANKES L.J. In this action the plaintiffs claimed the delivery up to them by the defendants of certain bills of lading, and for payment of a balance of account, and the defendants counterclaimed for the return of a large sum of money which they alleged that the plaintiffs had improperly retained, and had not paid over to them as they should have done. The dispute between the parties depended entirely upon whether the defendants were or were not bound by an agreement which was said to have been entered into on their behalf by one of their directors, Mr. Maurice Lowe.

The plaintiffs are a firm of well known fruit brokers carrying on business in Liverpool and in London. The defendant company was formed in the month of May, 1920, for the purpose of promoting and assisting the business of two fruit importing concerns, George Wills & Sons, Ld., and the Nothard and Lowe Fruit and Preserving Co., Ld., and for preventing competition between them. By the articles of association of the defendant company it was provided that the first directors of the defendant company should be Messrs. Braund and Walker, and Messrs. Maurice and George Lowe; the two

(1) (1856) 6 E. & B. 341.

former being directors of and representing George Wills & Sons, Ld., and the two latter being directors of and representing the Preserving Co. Art. 28 contained very wide powers of delegation. It was in these terms: "The directors from time to time, and at any time, may delegate to any managing director, local board, head manager, manager, attorney or agent, any of the powers, authorities and discretions for the time being vested in the directors, and any such appointment or delegation may be made on such terms and subject to such conditions, including power to sub-delegate, as the directors may think fit, and the directors may at any time remove any person so appointed, and may annul or vary any such delegation, but no person dealing in good faith and without notice of such annulment or variation shall be affected thereby." By an agreement dated July 14, 1920, and made between George Wills & Sons, Ld., the Preserving Co., and the defendant company, it was provided (inter alia) that the share capital of the defendant company should be taken up by the other two companies, that George Wills & Sons, Ld., should finance the defendant company to the extent of 50,000*l.* for a period of five years, and that for the same period the Preserving Co. would give the defendant company the full benefit of its organization and would supply it with adequate warehouse accommodation, quay facilities, and all other conveniences for handling their goods, including the provision of all staff necessary for this purpose. The scheme for the future carrying on of the businesses of the two companies other than the defendant company, so far as their trade was concerned with the purchase and sale of fresh fruit, was that the defendant company should employ George Wills & Sons, Ld., as their exclusive agents to buy fruit in the United States and Canada (except Nova Scotia) on usual commission terms, and to employ the Preserving Co. as their exclusive agents on the same terms for Australia, New Zealand and Tasmania. In order to follow the course of business as carried on in this country by the defendant company it is necessary to know that a firm of Nothard & Lowe had been a very long established

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and very well known firm in the fruit trade, who, in the early part of 1920, had transferred their business to the Preserving Co. After the transfer the business of the Preserving Co. continued to be carried on upon the premises on which it had been carried on by the firm, and the documents used for business purposes were headed "Established 1846." "Nothard & Lowe" in large type; then in brackets in small type, "Proprietors, the Nothard & Lowe Fruit and Preserving Company, Limited." There is little wonder under these circumstances that persons dealing with the Preserving Co. dealt with them, and spoke and wrote of them as Nothard & Lowe. Further, when the defendant company came upon the scene and carried on its business in the same offices, and with the same staff as the Preserving Co., again there is little wonder that persons dealing with them also spoke and wrote of them as Nothard & Lowe. When it is borne in mind that Mr. Maurice Lowe was the person who had charge of the fruit selling portion of both businesses, again there is little wonder that fruit brokers could be called to say, as they did say, that they always looked upon the Nothard & Lowe business as the business of some fruit concern managed by Mr. Maurice Lowe, but the details of which they did not know. In my opinion what other brokers thought and did is quite immaterial. The all important question in the present case is what the plaintiffs' representative, Mr. Dart, thought and did.

The material facts on this point lie in a narrow compass. In the early summer of 1924 the plaintiffs got into touch with Mr. Maurice Lowe in reference to the then approaching apple season, and in reference to the plaintiffs acting as brokers for the sale of apples imported by the Nothard & Lowe business. At that time the Preserving Co. were in straits for money, and were heavily indebted to the defendant company, and Mr. Maurice Lowe's object in arranging terms with the plaintiff company was to secure financial assistance in return for the business which it was in his power to give to the plaintiffs. As a result of conversations between Mr. Maurice Lowe and Mr. Dart the following proposals were

put forward—namely, that the plaintiffs should advance a sum of 20,000*l.* to the Preserving Co., and in return they should be guaranteed the right of disposing of all the apples imported either by the Preserving Co. or the defendant company, and with the further right of retaining 70 per cent. of the net proceeds of sales of those apples, and with a further right to a charge upon certain properties of the Preserving Co. situate in Nova Scotia. On receipt of these proposals Mr. Dart wrote to his principal in Liverpool on July 14, 1924, and in that letter he sets out the proposals and makes it quite clear that he realizes that the defendant company, and what he calls Nothard & Lowe, are distinct entities, and that the fruit to be dealt with will belong partly to the one and partly to the other concern. The reply he receives on the next day by telegram agrees to the proposals subject to satisfactory report as to the properties, and goes on in these terms: "Presume minimum quantity to be received will be stated in writing, also retention 70 per cent. proceeds." After receipt of this telegram Mr. Dart writes to Mr. Maurice Lowe the very important letter of July 16, the material parts of which I must read. "I think it well to confirm the conversation we had on Monday in writing, to see if we understand each other correctly. I wish to commence by thanking you for the offer of the business, and feel that if we once start working together, we shall neither of us have anything to regret. I understand that you wish my firm to advance to Messrs. Nothard & Lowe 10,000*l.* now, and another 5000*l.* on 25th August, and a final 5000*l.* some time in September, making a total of 20,000*l.* and that you would give us the deeds of your packing houses as security, which are worth some 13,000*l.* Presumably these documents you will have recorded at the Register of Deeds in the usual way. You will guarantee a minimum of 50,000 barrels Nova Scotian apples. Besides your Nova Scotian fruit, we would receive free of advance all the goods consigned to Messrs. Nothard, Lowe & Wills at Liverpool, and the total of the two firms would amount to about 150,000 packages. We would keep back 70 per cent.

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of the net proceeds, whether the goods belonged to your firm or to Messrs. Nothard, Lowe & Wills. I should presume the arrangement with respect to Messrs. Nothard, Lowe & Wills would have to be subscribed to by them." It is, I think, manifest from this letter (*a*) that Mr. Dart was addressing Mr. Lowe as the accredited representative of what he calls Nothard & Lowe; (*b*) that he fully realized the distinction between Nothard & Lowe and the defendant company, and that some portion of the goods to be dealt with would belong to the latter; (*c*) that he did not regard Mr. Maurice Lowe as having authority to bind the defendant company, as he "presumed" that the arrangement so far as it purported to bind them "would have to be subscribed to by them." After some correspondence and a telephone conversation on July 19, Mr. Maurice Lowe wrote to the plaintiffs on that date: "Private and Confidential. After consideration, Mr. Prescott, my brother George and myself, have agreed to take a half guarantee for 10,000*l*., and we enclose you herewith the proposed form, which I would ask you to alter should you think necessary. I confirm conversation with you on the telephone, and have to reiterate that we could not in any way agree to the registering of the deeds, but, as mentioned this morning, we are prepared to give you a letter drawn up by our solicitors to the effect that the deeds of the warehouses are given to you as security. More than this we cannot do." So the matter stood, the plaintiffs or Mr. Dart, upon the correspondence, expecting and expecting only (*a*) some formal acknowledgment by the defendant company that they accepted and were bound by the proposals, and (*b*) a letter from "our solicitors" in reference to the warehouses. What in fact the plaintiffs received was a letter dated July 22, 1924, on the Nothard & Lowe notepaper signed for Nothard & Lowe, A. V. Prescott, director, enclosing a formal agreement bearing that date between the Preserving Company, the guarantors, and the plaintiffs, which contains some of the agreed terms, and in reference to the defendants' position in the matter a special clause No. 6, which is in these terms: "For the consideration aforesaid the company"

—that is the Preserving Company—" and the guarantors hereby jointly and severally undertake that the agents "—that is the plaintiffs—" shall be entitled to retain and apply in or towards repayment of the said advances seventy per cent. of the net proceeds of the sale of goods sold by the agents on behalf of or as agents for Nothard, Lowe & Wills, Limited." It will be noticed that the defendant company are not made parties to the agreement, and the agreement contains no reference to the important stipulation in Mr. Dart's letter of July 16, agreed to in Mr. Maurice Lowe's letter of the following day, that the plaintiffs were to receive free of advance all the goods consigned to the defendant company at Liverpool. On the same date, July 22, a letter was written purporting to be on behalf of the defendants, signed A. V. Prescott, secretary, in the following terms: " Messrs. J. C. Houghton & Co. Dear Sirs,—We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on our behalf are to be placed by you in reduction of advances made to Messrs. Nothard & Lowe in the same proportions and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard & Lowe. We shall, in accordance, credit the proceeds of such sales against the advances above referred to."

It is under these circumstances that the plaintiffs assert that Mr. Maurice Lowe had actual authority to enter into an arrangement binding the defendant company, and entitling the plaintiffs to retain 70 per cent. of the net proceeds of the defendants' goods. The learned judge decided against the plaintiffs on this point, and in my opinion he was clearly right in so doing, as there was no evidence whatever of any actual authority having been conferred upon him in any manner binding upon the defendant company to enter into any such arrangement.

The plaintiffs' second ground of claim and the defence to the counterclaim were rested upon the rule of law laid down in *Mahony* v. *East Holyford Mining Co.* (1) and other

(1) L. R. 7 H. L. 869.

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similar cases. Upon this part of the case the learned judge decided in the plaintiffs' favour. I should not have been at all sorry if I could have shared the learned judge's view. In my opinion the facts are too strong to admit of the application of the rule referred to. The rule, and the application of the rule, were recently discussed in this Court in the case of *Underwood* v. *Bank of Liverpool* (1), where the authorities are collected. Those authorities, I think, make it clear that in order to establish a case which falls within the rule it is essential that the person who claims the benefit of it must (*a*) prove that he relied upon the ostensible authority which he sets up, and (*b*) must not have been put upon inquiry as to whether the transaction was in order. In the present case the plaintiffs fail, in my opinion, on both points. If the letter of July 16 stood alone I should say that it was really conclusive on the first question, because I cannot attach any meaning to Mr. Dart's language, except that he was not satisfied that Mr. Maurice Lowe had the necessary authority to bind the defendants. In his evidence Mr. Dart was asked questions expressly directed to this point. Mr. Porter at p. 6 of the shorthand note asks him: "When you received that confirmation"—that is, the secretary's letter—"did you believe that Nothard, Lowe & Wills Limited, were bound by this agreement? (A.) Certainly, I believed it. I had no doubt whatever." And in cross-examination by Mr. Merriman at p. 32 he is asked: "First of all, having admitted that you intended the arrangement, whatever it was, to be reduced into writing, you also intended that the writing, whatever it was, should be subscribed by the defendant company? (A.) Yes." And to the next question he replies that he thought the secretary's letter was just as good as an agreement. Other passages in the evidence might be referred to, but I have quoted sufficient to show that Mr. Dart in dealing with the defendant company was not relying upon any ostensible authority in Mr. Maurice Lowe, but upon what he unfortunately accepted as a binding written

(1) [1924] 1 K. B. 775.

acceptance by the company of the terms negotiated between Mr. Maurice Lowe and himself. This conclusion, once arrived at, is sufficient to dispose of these appeals.

As I have mentioned the second point I will deal with that. Here again I am afraid that the facts, and the inference from the facts, are destructive of the plaintiff's case. In the first place I think that the nature of the transaction was such as to put Mr. Dart on inquiry. It cannot be considered as an ordinary transaction where the money of one company is to be used to pay the debts of another. Mr. Dart, who gave his evidence apparently very frankly, as good as admitted that in his answers to Mr. Merriman at p. 25 and following pages of the shorthand notes. Apart from the nature of the transaction itself there was, I think, abundant cause for making Mr. Dart suspicious and putting him upon inquiry. As a result of his negotiations with Mr. Maurice Lowe Mr. Dart was expecting to receive confirmation in writing, and particularly confirmation in writing from the defendant company, of the arrangements negotiated between himself and Mr. Lowe. What he does receive is not a mere confirmation from the Preserving Co., but a formal agreement signed, sealed and delivered, to which the defendant company is not a party. That in itself ought I think to have put Mr. Dart on inquiry, but when that formal document from the company whose subscription to the terms was not stipulated for is contrasted with the very informal document from the company whose subscription was stipulated for, the demand for inquiry becomes more insistent. The matter, however, does not rest there, because the informal letter from the secretary omits all reference to a most material part of the bargain—namely, the guarantee by the defendant company as to the disposal of their fruit.

Under these circumstances I find myself, with respect to the learned judge who tried this action, unable to agree with him in the conclusion that the plaintiffs were entitled to deal with Mr. Maurice Lowe, to use the judge's words, "as the representative and plenipotentiary of the defendant

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company," and I come to my decision upon the grounds which I have stated—namely, that although Mr. Dart may have been entitled to deal with Mr. Maurice Lowe as the accredited representative of the defendant company to negotiate the business, on his own showing he did not regard him as a person having authority to make a contract binding the defendant company; and further, that even if this is not a true inference from the facts, yet that the circumstances were such that Mr. Dart was obviously put upon inquiry as to the extent of any authority that Mr. Maurice Lowe possessed.

Under these circumstances it appears to me immaterial that the articles of association contained the extremely wide powers of delegation which they did contain, and it is unnecessary to consider how far under other circumstances it might be possible to rely upon the possible existence of some exercise of such powers. By an amendment to their pleadings the defendants set up a case of estoppel. But there was no attempt made to prove any such case. In order to succeed it would have been necessary to establish that Mr. Dart saw and relied on the correspondence to which our attention was directed and altered his position in consequence of it. No doubt the reason why no questions were put to him on these points was that he was completely satisfied with the documents which had been sent to him as containing the agreement, and that he paid no particular attention to the letters even if he saw them. Be this as it may the defendants cannot rely upon this defence, which must depend entirely upon evidence which was not forthcoming.

In my opinion the appeal succeeds, and as a result the judgment must be set aside and entered for the defendant company on the claim with costs, and for the defendant company also on the counterclaim for 19,757*l.* with costs, and the respondents must pay the costs of the appeal.

ATKIN L.J.: I agree that the appeal should be allowed, and I do not give a judgment of my own, for I agree with the

reasons given in the judgment which is about to be read by Lord Justice Sargant.

SARGANT L.J. In this case it is quite clear that neither Mr. Maurice Lowe, as a director, nor Mr. Prescott, as the secretary of the defendant company, had any authority to make any such contract on behalf of the company as that alleged in para. 1 of the statement of claim. The management of the business of the company was in the usual course and under the express provisions of art. 71 of Table A, in the hands of the directors, that is of the board of directors; and there had been no delegation to Mr. Maurice Lowe or to the secretary of the power of the board to enter into a contract of this character. The entrusting to Mr. Maurice Lowe and his brother of the duties in connection with the selling of the produce of the defendant company obviously did not include the formation of a contract, under which the produce of the company should be charged by way of collateral security to secure a series of advances made and to be made to another company, however closely associated in business with the defendant company. The decision of Wright J. in favour of the plaintiffs is founded not on actual authority, but on a wholly different ground—namely, the title of the plaintiffs in the circumstances to assume that such an authority had been given, and to act on that assumption.

Before considering this view I pause to note that in the correspondence and transactions between the parties, and also to some extent in the argument before this Court, confusion has been caused by the similarity of the names of some of the firms or companies concerned. First, there is the former firm of Nothard & Lowe. Secondly, there is the company that had taken over the firm's business, the full name of which was the Nothard and Lowe Fruit and Preserving Co., Ld., but which was often referred to as Nothard & Lowe, Ld., or even as Nothard & Lowe. This company I will refer to as the Preserving Co. And, thirdly, there is Nothard, Lowe & Wills, Ld., a company

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formed and owned jointly by the Preserving Co. and another limited company called George Wills & Sons, Ld., and having a directorate composed of directors of both the forming companies: this third company I will refer to as the defendant company. The liability to confusion to which I have referred was accentuated by the fact that the Preserving Co. and the defendant company occupied the same offices and had the same secretary; and that the letter paper of either of these two companies seems to have been used indifferently for the purposes either of the one company or of the other. And further, in the branch of the business of the defendant company with which the transactions now in question were concerned, the general selling was conducted by the Preserving Co. and by their two directors, Maurice Lowe and George Lowe, who had been the partners in the firm of Nothard & Lowe. In fact, however, Mr. Dart, who was the partner of the plaintiff firm who played the principal part on their side in these transactions, was well aware of the distinction between the Preserving Co. and the defendant company, and of the fact that they constituted two different corporations, although their interests might be interconnected and even in some respects identical.

Turning now to a more minute examination of the judgment of Wright J., the steps by which he arrives at the conclusion that the defendant company were bound as towards the plaintiffs are as follows. In the first place he finds that Mr. Maurice Lowe contracted with Mr. Dart, not only on behalf of the Preserving Co., but on behalf of the defendant company, and that this contract was affirmed on behalf of the defendant company by their secretary's letter of July 22, 1922. In the next place he relies on the fact that under the articles of association of the defendant company (both as incorporating Table A and under a special art. No. 28) their board of directors might have delegated their power to enter into such a contract to any person, including a single director or their secretary. And, thirdly, he draws the conclusion that, although this power to delegate was unknown to Mr. Dart or to any one else acting for the

plaintiffs, yet Mr. Dart and the plaintiffs were entitled to treat this as a matter of internal management only and to assume that Mr. Maurice Lowe and the secretary in fact possessed the power to bind the defendant company.

As regards the first and least important of these steps, I am not able to take quite the same view as the learned judge, though I am naturally reluctant to differ from him on a question of fact, which depends partly on the oral evidence of Mr. Dart. But I cannot think that his oral evidence really carries the question of contract further than his letter of July 16, 1924, written expressly to confirm (and, I think, define) the subject-matter of his understanding with Mr. Maurice Lowe, and then the subsequent formal agreement of July 22, 1924. Both these documents, in my view, indicate clearly that, while the prospect is held out of bringing the defendant company into the transaction as pledgors of the proceeds of their fruit, the actual binding of the defendant company is still to come. The sentence in the letter, "I should presume the arrangement with respect to Messrs. Nothard, Lowe & Wills would have to be subscribed to by them," points clearly and unambiguously in this direction. Equally significant is the fact that clause 6 of the formal agreement, which is the only clause mentioning the defendant company, is merely an undertaking by the Preserving Co. and their directors and secretary as guarantors that the plaintiffs shall be entitled to apply in reduction of their loan to the Preserving Co. 70 per cent. of the proceeds of goods sold by the plaintiffs for the defendant company. And, finally, there is the letter of July 22, 1924, signed by Mr. Prescott as for and on behalf of the defendant company. In my judgment it was this letter, and this only, which was intended to be and was the direct obligation on the defendant company; and this direct obligation was that which had been stipulated for by the sentence already quoted from the letter of July 16, 1924, and which was in fulfilment of the joint and several undertaking of clause 6 of the agr ement of July 22, 1924.

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Next as to the power to delegate which is contained in the articles of association. In a case like this where that power of delegation had not been exercised, and where admittedly Mr. Dart and the plaintiff firm had no knowledge of the existence of that power and did not rely on it, I cannot for myself see how they can subsequently make use of this unknown power so as to validate the transaction. They could rely on the fact of delegation, had it been a fact, whether known to them or not. They might rely on their knowledge of the power of delegation, had they known of it, as part of the circumstances entitling them to infer that there had been a delegation and to act on that inference, though it were in fact a mistaken one. But it is quite another thing to say that the plaintiffs are entitled now to rely on the supposed exercise of a power which was never in fact exercised and of the existence of which they were in ignorance at the date when they contracted. No case was cited to us in which a binding obligation has been constructed out of so curious a combination; and I cannot see any principle on which an obligation could be so constructed.

But even if Mr. Dart, and through him the plaintiffs, had been aware of the power of delegation in the articles of the defendant company, this would not in my judgment have entitled him or them to assume that this power had been exercised in favour of a director, secretary or other officer of the company so as to validate the contract now in question. The learned judge, indeed, has said that this follows from a well recognized line of cases, refers as an example to the case of *In re Fireproof Doors, Ld.* (1), and holds that the plaintiffs were entitled to assume that anything necessary to delegate any of the functions of the board to one director or two directors had been done as a matter of internal management. But, in my opinion, this is to carry the doctrine of presumed power far beyond anything that has hitherto been decided, and to place limited companies, without any sufficient reason for so doing, at the mercy of any servant or agent who should purport to contract on their behalf. On this view, not only

(1) [1916] 2 Ch. 142.

a director of a limited company with articles founded on Table A, but a secretary or any subordinate officer might be treated by a third party acting in good faith as capable of binding the company by any sort of contract, however exceptional, on the ground that a power of making such a contract might conceivably have been entrusted to him.

Cases where the question has been as to the exact formalities observed when the seal of a company has been affixed, such as *Royal British Bank* v. *Turquand* (1) or *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (2), are quite distinguishable from the present case. *In re Fireproof Doors, Ld.* (3), tends rather against than in favour of the plaintiffs, since if a single director has as towards third parties the authority now contended for, the whole of the elaborate investigation of the facts in that case was entirely unnecessary. Perhaps the nearest approach to the present case is to be found in *Biggerstaff* v. *Rowatt's Wharf, Ld.* (4) But there the agent whose authority was relied on had been acting to the knowledge of the company as a managing director, and the act done was one within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs. It is I think clear that the transaction there would not have been supported had it not been in this ordinary course, or had the agent been acting merely as one of the ordinary directors of the company. I know of no case in which an ordinary director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the board to make the contract. A limitation of the right to make such an assumption is expressed in Buckley on the Companies Acts, 10th ed., p. 175, in the following concise words: "And the principle does not apply to the case where an agent of the company has done something beyond any authority which was given to him or which he was held out as having."

(1) 6 E. & B. 327.
(2) [1895] 1 Ch. 629.
(3) [1916] 2 Ch. 142.
(4) [1896] 2 Ch. 93.

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A suggestion was made that as to part at least of the sums deducted by the plaintiffs the defendant company might be estopped from complaining, because on receipt of information of an actual deduction they merely acknowledged the information, took no objection, and simply left the plaintiffs to continue their arrangements with the Preserving Co. in reliance on the defendant company's acquiescence: see the letter of September 6, 1924, at p. 82 of the correspondence. But I think this letter is merely one of the instances of the indiscriminate use of the letter paper of the defendant company and the Preserving Co., and it is in any case a mere formal acknowledgment to which little importance can be attached in itself. And further, it is a fatal objection to this suggestion that neither Mr. Dart nor any other partner or agent of the plaintiff firm alleged that he had paid any attention to this letter or that it had in any way influenced his conduct. Indeed it is quite clear that Mr. Dart and, through him, the plaintiff firm, were relying on the arrangements previously made and on the general good faith and integrity of Mr. Maurice Lowe.

So far I have dealt only with the original advance of 10,000*l.* and the arrangement for the deduction of 70 per cent. of the proceeds of the defendant company's fruit as alleged to have been made with Mr. Maurice Lowe and confirmed by the secretary of the defendant company. The subsequent alleged arrangements as to further advances and as to the increase of the percentage of deduction to 100 per cent., which were made with Mr. George Lowe and were not in terms confirmed by the secretary, are in no stronger position, to say the least of it, than the original arrangement, and must in my judgment fall with it.

The result is that the decision of the learned judge must be reversed, with costs here and below.

Appeal allowed.

Solicitors for the appellants: *Kimber Bull, Howland & Co.*

Solicitors for the respondents: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

J. F. C.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1925 *Dec.* 4, 8.
C. A. 1926 *July* 15, 16, 19.

CAYZER, IRVINE AND COMPANY, LIMITED *v.* BOARD OF TRADE.

Arbitration—Charterparty—Arbitration to be Condition Precedent to Commencement of Action—Right of Crown to rely on Statute of Limitations—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

In May, 1917, the Crown requisitioned the claimants' steamship under the conditions of the T.99 form of charterparty. By those conditions the Crown undertook liability for war risks only, and, by clause 31, "any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889," to arbitration, "and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law."

In July, 1917, the steamship was lost, as the claimants alleged, by war risks, but owing to the pendency of other cases involving the same point which were not finally decided till 1923, the claim for compensation was not formally submitted to arbitration by the claimants till December, 1923. The Crown contended that as the arbitration was not commenced within six years of the loss of the steamship the claim was barred by the Limitation Act, 1623. By his award made in February, 1925, the arbitrator found that the steamship was lost by war risks and that the claim was not barred by the Limitation Act, 1623, but stated a case for the opinion of the Court on the question whether he was right in so awarding.

Rowlatt J. held that the Crown was entitled to rely on the Limitation Act, 1623, in the arbitration proceedings, there being no provision in the submission precluding it from so doing, and therefore that the claim was barred:—

Held, by the Court of Appeal, that by clause 31 of the charterparty, which was substantially in the same form as the clause in *Scott* v. *Avery* (1856) 5 H. L. C. 811, an award was made a condition precedent to a cause of action, and as no award was made till February, 1925, the Limitation Act, 1623, had no application.

Quaere, whether a term can be implied in a submission to arbitration that the arbitrator is to take into account the Statutes of Limitation.

Quaere, whether *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1899) 68 L. J. (Q. B.) 252 was rightly decided.

AWARD in the form of a special case.

The facts, which are fully stated in the judgment of Lord Hanworth M.R., were shortly as follows:—

The claimants, Cayzer, Irvine & Co., were at all material times the owners of the steamship *Clan Maclachlan*, which

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was requisitioned by the Ministry of Shipping in May, 1917, under the conditions of the T.99 form of charterparty. In July, 1917, whilst so requisitioned, the steamship was lost, as the claimants alleged, by war risks which were taken by the Admiralty under the terms of the charterparty. This allegation was denied by the Board of Trade, as successors to the Ministry of Shipping, and the dispute thereby arising was on November 29, 1923, referred to arbitration in accordance with a clause in the charterparty, which also provided as follows: "It is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law."

In the arbitration proceedings it was contended (inter alia) by the Board of Trade that as the proceedings were not taken within six years after the loss of the steamship the claim was barred by the Statute of Limitations (21 Jac. 1, c. 16).

By his award dated February 9, 1925, the arbitrator awarded (inter alia) that the vessel was lost by war risks, and that the claim was not barred by the Statute of Limitations by reason of the fact that the arbitration proceedings were not taken within six years after the date of the loss of the steamship, and he made an award in favour of the claimants.

Sir Douglas Hogg A.-G. and *Russell Davies* for the Board of Trade. The question is, can the Crown rely on the Statute of Limitations (21 Jac. 1, c. 16) in arbitration proceedings? The general rule as stated in Chitty on Prerogatives of the Crown, p. 382, is that, "though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him." This statement is clearly established by a long series of authorities: see *Case of a Fine levied by the King* (1); *Magdalen College Case* (2); *Reg.* v. *Cruise* (3); *Attorney-General* v. *Tomline* (4); 1 Black. Com. 262. The Crown is therefore entitled to avail itself of the Statute of Limitations in actions brought against it. It is

(1) (1605) 7 Rep. 32*a*.
(2) (1616) 11 Rep. 66*b*.
(3) (1852) 2 Ir. Ch. Rep. 65.
(4) (1880) 15 Ch. D. 150.

true that in *Rustomjee* v. *The Queen* (1), where it was held that the statute cannot be pleaded to a petition of right, there are in the report in the Law Reports certain observations which might suggest that the statute applies only in actions between subject and subject, but in the Law Journal report this is not borne out. Assuming that case was rightly decided, which we do not admit, it decided only, so far as material to the present case, that the Statute of Limitations does not apply to a petition of right, because the statute applies to actions, and a petition of right is not an action. The question then is, does the Statute of Limitations apply to arbitration proceedings? In *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (2) Bruce J., with whom Ridley J. agreed, said that "it seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitations, unless a provision to that effect be drawn up and embodied in the submission." There the statute was held to be a good defence; and if it can be raised by a subject, it can be raised by the Crown.

A. T. Miller K.C., *A. T. James* and *James MacMillan* for the claimants. There are three answers to the argument for the Crown. First, as by the charterparty an award is made a condition precedent to the commencement of any action, there was nothing upon which the Statute of Limitations could begin to operate until the award was made in February, 1925. There was no cause of action against the Board of Trade till the award was made: *Scott* v. *Avery* (3); *Hart* v. *Hart* (4); *Caledonian Insurance Co.* v. *Gilmour* (5); and *Turner* v. *Midland Ry. Co.* (6)

Secondly, in any case the Crown is not protected by 21 Jac. 1, c. 16. As was said by Blackburn J. in *Rustomjee* v. *The Queen* (7), "the Statute of Limitations has relations only to actions between subject and subject, the Crown cannot be

(1) (1876) 1 Q. B. D. 487; 45 L. J. (Q. B.) 249.
(2) 68 L. J. (Q. B.) 252, 255.
(3) 5 H. L. C. 811.
(4) (1881) 18 Ch. D. 670, 689.
(5) [1893] A. C. 85.
(6) [1911] 1 K. B. 832.
(7) 1 Q. B. D. 487, 491.

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bound by it," and there is good ground for that view. If the Crown is not bound by the Statute of Limitations it is not just that it should be allowed to rely upon it.

Thirdly, apart altogether from the fact that the Crown is a party, it is submitted that the Statute of Limitations has no application in arbitration proceedings. This point was not taken in *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1), and the case proceeded upon the basis that the statute did apply. *Rustomjee* v. *The Queen* (2) decided that the statute could not be set up in a petition of right, because a petition of right is not an action. The same reason applies in the case of arbitration proceedings. These are not proceedings in Court: *Macfarlane* v. *Lister* (3); *In re Shaw and Ronaldson.* (4)

Russell Davies in reply was not called on as to the effect of the arbitration clause in the charterparty. An arbitrator has to deal with the submission according to law, and that may, as in this case, involve the consideration of the Statute of Limitations. The statute imposes a disability on the claimants, and that disability is incorporated in the arbitration proceedings. Looked at in this way, the Crown when a party to arbitration proceedings may avail itself of the disability of the other party.

Cur. adv. vult.

Dec. 8. ROWLATT J. In this case the sole question for my decision is whether the arbitrator was right in refusing to give effect, in favour of the Crown, to the Statute of Limitations (21 Jac. 1, c. 16). That statute does not in terms apply to arbitrations. It does not affect the debt. It only limits the remedy, and therefore it seems to me that in an arbitration it is a question of construction whether the submission requires the arbitrator to follow the analogy of the statute. The submission may by its terms require him to give effect to, say, a two years' limitation or any other agreed term, or not at all. That it is such a question of

(1) 68 L. J. (Q. B.) 252, 255.
(2) 1 Q. B. D. 487.
(3) (1887) 37 Ch. D. 88.
(4) [1892] 1 Q. B. 91.

construction appears from *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1), where it was said that if the submission is silent upon the point, the arbitrator has to take the statute into consideration. Mr. Miller for the claimants in the present case drew my attention to the fact that this submission is in what I may call the *Scott* v. *Avery* (2) form, that is, it makes the award a condition precedent to a right of action, and he pointed out that, in those circumstances, if an action is brought, the statute begins to run only from the date of the award. That no doubt is so, but that does not touch the point whether the arbitrator may take the statute into his consideration at an earlier stage—namely, when he is making his award.

Having stated my view with regard to the position in arbitrations between subjects we come now to the case where the Crown is a party. The Crown cannot be sued, but it can admit proceedings being taken against it under the Petition of Right Act. It is not accurate to say that the Crown can be sued by petition of right. The petition is referred to the Court by the Crown through the Secretary of State, whose constitutional duty no doubt is to advise the Crown to refer the petition in a proper case, that is, where there is really something to be tried. As a matter of practice the Secretary of State acts upon the advice of the law officers of the Crown. In *Rustomjee* v. *The Queen* (3) it was said by the Court, although this does not appear to have been necessary for the decision, that the Statute of Limitations could not be pleaded in a petition of right, inasmuch as the statute applies to an action, and a petition of right is not an action. The Court did not in that case consider whether it might be said that the action of the Crown in allowing proceedings against itself by calling into operation the machinery of the Petition of Right Act impliedly imported the Statute of Limitations into the question between the parties. In my opinion when the Crown enters into a submission in a commercial matter the consideration of the Statute of Limitations is imported into

(1) 68 L. J. (Q. B.) 252. (2) 5 H. L. C. 811.
(3) 1 Q. B. D. 487.

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it, if the submission is in such a form as that, if it had been entered into between subjects, that consequence would have followed. The like consequence would, I think, follow if a foreign Government entered into a submission of this kind in this country, although the foreign Government could not be sued here, nor, of course, could it authorize proceedings against itself by a petition of right. There is no quality inherent in the Crown which excludes the operation of the Statute of Limitations in its favour. According to the rule stated in Chitty on the Prerogatives of the Crown, p. 382, the Crown can avail itself of the provisions of any Acts of Parliament, although it may not be bound by them. I cannot therefore see why this submission should not be given its ordinary construction.

I desire to add that what I have said does not touch the question whether such a submission gives the subject the right to plead the statute against the Crown. If it should arise, the question will have to be carefully considered whether the contract can be construed as taking away the right inherent in the Crown not to be prejudiced by the laches of its servants, just as it has been held that a contract entered into by an official, however highly placed, on behalf of the Crown, which purported, for example, to give employment to a person on a tenure longer than at the pleasure of the Crown, cannot have effect, because it is beyond the power of the official.

I answer the question put to me in this case by the arbitrator in favour of the Crown.

Award in favour of Crown.

J. S. H.

The claimants appealed. The appeal was heard on July 15, 16, 19, 1926.

Sir John Simon K.C., *A. T. James* and *James MacMillan* for the appellants. It is submitted (1.) that the Limitation Act, 1623 (21 Jac. 1, c. 16), refers solely to a limited class of actions and suits, and does not apply to arbitrations at all;

(2.) that this charterparty has an arbitration clause which is in effect a *Scott* v. *Avery* (1) clause, and where there is such a clause, a cause of action is never complete until the award has been made, and time does not begin to run under the statute until after the award; (3.) that as between subject and subject there is nothing in this charterparty to justify the implication of a term that the arbitration must be initiated within six years of the loss, and such a term cannot be implied where there is a *Scott* v. *Avery* (1) clause; and (4.) that the Crown is not bound by and therefore cannot rely on the Statute of Limitations; there is no ground for saying that on the true construction of that statute, while no one can set it up against the Crown yet the Crown can set it up against the subject.

On the first point, s. 3 of the Act refers only to certain kinds of actions and suits. It needed a statute to limit in point of time a man's common law right. For time to run the cause of action must be complete. There is no cause of action to which the Statute of Limitations can apply, for instance, in respect of a claim for compensation under the Lands Clauses Act until the arbitrator has made his award: *Turner* v. *Midland Ry. Co.* (2), in which case no claim for compensation was made until after the expiration of six years from the execution of the work giving rise to the claim. In the case of a solicitor, his cause of action for costs arises as soon as he has completed the work for his client, and not from the date when he delivers a bill of costs: *Coburn* v. *Colledge*. (3) The same principle was applied in *Cheshire County Council* v. *Hopley*. (4)

[ROMER J. Does the Crown suggest that the agreement to refer to arbitration must be performed within six years from the loss?]

Yes; Rowlatt J. considered that it was a question of construction whether the submission required the arbitrator to follow the analogy of the statute, and adopted the decision in *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley*

(1) 5 H. L. C. 811.
(2) [1911] 1 K. B. 832.
(3) [1897] 1 Q. B. 702.
(4) (1923) 130 L. T. 123.

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Coal Co. (1), where it was said that if the submission is silent upon the point, the arbitrator has to take the statute into consideration. But there there was an implied stipulation which brought in the statute, and that case is no authority for the broad proposition that you must bring your claim under an arbitration clause within the time limit and that the arbitrator must take into account the Statute of Limitations.

Scott v. *Avery* (2) decided that by their arbitration clause the parties were not ousting the jurisdiction of the Court but merely postponing the cause of action until the award was made, or, in other words, making the award a condition precedent to the bringing of any action. *Caledonian Insurance Co.* v. *Gilmour* (3) is to the same effect. In *Rustomjee* v. *The Queen* (4) it was held that the Statute of Limitations did not apply to a petition of right, because it applied only to actions and suits between subject and subject, but it is submitted that there is no real ground for saying that the statute may not bind the Crown. The statement in Chitty on Prerogatives of the Crown, p. 382, that "though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him" is founded on a passage in the *Magdalen College Case* (5), but that passage is to be found only in the unsuccessful argument in the case, and not in the judgment. The position is discussed in Craies on Statute Law, 3rd ed., pp. 349 and 366. *Hornsey Urban Council* v. *Hennell* (6), relating to paving expenses under the Public Health Act, 1875, and *Cooper* v. *Hawkins* (7), relating to a servant of the Crown exceeding the speed limit under the Locomotives Act, 1865, are cases in which was applied the principle that where the Crown is not named in an Act, it is not bound. By s. 16 of the Motor Car Act, 1903, that Act is made to apply to persons in the public

(1) 68 L. J. (Q. B.) 252.
(2) 5 H. L. C. 811.
(3) [1893] A. C. 85.
(4) 1 Q. B. D. 487.
(5) 11 Rep. 66*b*.
(6) [1902] 2 K. B. 73.
(7) [1904] 2 K. B. 164.

service of the Crown, but the Act does not expressly bind the Crown.

The result seems to be that there is no authority for the proposition that where a statute binds the subject and not the Crown, yet the Crown can take advantage of it against the subject.

As an illustration of the proposition that there are a number of statutes which are for the benefit of the subject and not of the King, see Stat. of Westminster II. (13 Edw. 1, c. 5), where it is provided that where a clergyman has been put into possession of his living and remains in it for six months he cannot be put out. That does not apply to the King. If, however, the King were patron of the living he would be bound by the limitation. The King is not bound by a statute unless mentioned in it, but there is nothing to show that if he is not bound by it he can take advantage of it. The main basis of Rowlatt J.'s judgment proceeds upon a fallacy, though a very natural one.

To sum up. The only point taken by the Crown before Rowlatt J. was: Can the Statute of Limitations be pleaded by the Crown in arbitration? The answer to that is, it is submitted, that it can certainly not be so pleaded.

[SCRUTTON L.J. referred to *Glasgow Corporation* v. *Smithfield and Argentine Meat Co.* (1); *Delany* v. *Metropolitan Board of Works*. (2)]

In re Shaw and Ronaldson (3) would appear to show that a "proceeding" would not cover an arbitration.

Sir Thomas Inskip S.-G. and *Russell Davies* for the Board of Trade. This is a very important case for the Crown. (1.) It is said that the Statute of Limitations does not apply to arbitrations at all; that the statute deals only with actions and suits. Sir John Simon drew a distinction between two classes: (1.) the *Scott* v. *Avery* (4) class, in which time does not begin to run until the publication of the award, and (2.) the class in which time runs from the happening of the

(1) (1912) 49 S. L. R. 287.
(2) (1867) L. R. 2 C. P. 532; L. R. 3 C. P. 111.
(3) [1892] 1 Q. B. 91.
(4) 5 H. L. C. 811.

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event. It is submitted that it is an implied term of a submission to arbitration that the statute is to apply. There being in this case no clause excluding the operation of the statute, the statute is part of the ordinary law applicable to the determination of the dispute. The question is not one of jurisdiction. What the arbitrator has to consider is whether the claimants have a good claim which is capable of being made the basis of an award in their favour. The statute is a defence which has to be made good like any other defence. The dispute in this case is twofold : (1.) was this a war risk ? and (2.) is the statute a defence ? There is an implied term that the arbitrator should decide the case as if the statute applied to arbitrations. The law which he has to apply is the ordinary law. He has not merely to determine the facts.

The point in the present case was dealt with by Bruce J., with whom Ridley J. agreed, in *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1) He there said : " It seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitations, unless a provision to that effect be drawn up and embodied in the submission." It is submitted that the ground on which Bruce and Ridley JJ. put their decision in that case was the right one. That case is an authority which is relied on in Russell on Arbitration and Award, 11th ed., p. 281, as establishing the proposition that a submission to arbitration does not, in the absence of some express provision in the submission itself, exclude the right of either party to set up the statute as a defence to an action. If the appellants are right in their contention parties to an arbitration will have to be very careful to see that they are not jettisoning their rights on a submission to arbitration. Although the Statute of Limitations applies in terms only to actions and suits, yet the arbitrator, who is a substitute for the Court, must apply the same general law as would be applied by the Court.

It is said that in the present case there is a *Scott* v. *Avery* (2) clause, and that in such a case time does

(1) 68 L. J. (Q. B.) 252, 255. (2) 5 H. L. C. 811.

not begin to run until the award has been made. But every form of arbitration is preliminary to a determination by the Court. Here although there is a bar to its enforcement the cause of action was complete before the commencement of the arbitration—namely, on the happening of the war risk. *Scott* v. *Avery* (1) merely lays down the procedure to be adopted for enforcing the liability. By way of illustration see *Turner* v. *Midland Ry. Co.* (2) That was an action under s. 68 of the Lands Clauses Act, 1845, and it was there held that the cause of action arose for the first time on the making of the award and that the plaintiff was not defeated by the Statute of Limitations. *Coburn* v. *Colledge* (3) was a different kind of case. There it was held that in the case of a solicitor's costs the cause of action arose when the work was completed, and therefore that the Statute of Limitations began to run from that time, and not from the expiration of one month from the delivery of the bill of costs. Lord Esher M.R. there said (4): "Then to what extent does the statute [the Solicitors Act, 1843] alter the right of the solicitor in such a case, and does the alteration made by it affect or alter the cause of action? It takes away, no doubt, the right of the solicitor to bring an action directly the work is done, but it does not take away his right to payment for it, which is the cause of action. The Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay." That reasoning is applicable to the present case.

[LORD HANWORTH M.R. referred to the cases cited in 1 Sm. L. C., 12th ed., p. 393.]

The *Scott* v. *Avery* (1) clause does not prevent the cause of action arising, but merely blocks the way to enforcing the remedy. But before that point is reached there is a dispute—namely, whether there is a cause of action at that time on which the arbitrator can make an award. We accept the decision in *Scott* v. *Avery*. (1)

(1) 5 H. L. C. 511.
(2) [1911] 1 K. B. 832.
(3) [1897] 1 Q. B. 702.
(4) Ibid. 706.

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The respondents' dispute here is whether the Statute of Limitations applies—whether the appellants have a right to recover under their contract. The respondents say to the arbitrator that they wish to have the dispute decided by him according to the law of the land. The arbitrator must look at the dispute as if it were one which would have to be decided by the Court but for the reference to arbitration. *Scott* v. *Avery* (1) is not a bar to the arbitrator applying the ordinary law.

[They referred to *Delany* v. *Metropolitan Board of Works* (2); *Caledonian Insurance Co.* v. *Gilmour* (3); *Hart* v. *Hart.* (4)]

It is submitted therefore that the arbitrator can entertain the statute.

It is said that no hardship can arise from prolonging the time. That may be so in a case where the defendant knows what the nature of the claim made against him is; but here the Crown had no such information.

[They also referred to *Attorney-General* v. *Tomline.* (5)]

Cur adv. vult.

July 19. LORD HANWORTH M.R. This is an appeal from a decision of Rowlatt J. upon a special case stated by the arbitrator, Mr. Claughton Scott K.C.

Messrs. Cayzer, Irvine & Co., Ld., are the owners of a steamship called the *Clan Maclachlan.* On May 14, 1917, she was requisitioned for and on behalf of the Admiralty, under the conditions of a form of charterparty shortly termed the T.99. That charterparty contained the following three important clauses: "18. The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk. 19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or

(1) 5 H. L. C. 511.
(2) L. R. 2 C. P. 532; L. R. 3 C. P. 111
(3) [1893] A. C. 85.
(4) 18 Ch. D. 670.
(5) 15 Ch. D. 150.

similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." Thus the owners undertook the ordinary marine risks, and the Admiralty the war risks. The other clause to which it is necessary to refer is clause 31: "Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties thereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law."

On July 19, 1917, the *Clan Maclachlan* was in collision with the *Europa*, an Italian commercial ship, and was sunk. On August 21 Messrs. Cayzer, Irvine & Co. gave notice of the loss, and a reply received from the Director of Transports and Shipping stated that the Department "admits no liability at present." On August 27 the owners in reply wrote that: "As soon as the position has been fully considered we shall further notify you if a claim on war risk policy is likely to be made." So matters rested, and it must be remembered that at that time losses which fell within ordinary marine risks and losses which constituted war risks were by no means clearly defined. In 1919 the marine underwriters paid 50 per cent. of the loss as a loan, and the terms upon which that payment was made contained this clause: "But this case to be reconsidered upon *Petersham* and *Matiana* judgments." That clause referred to two ships, about which there was a contest as to whether they had been lost under marine or war risks, and it may be stated that it was not until those cases (1) were determined, as they were, in 1920,

(1) See *Britain Steamship Co.* v. *The King*; *Green* v. *British India Steam Navigation Co.*; *British India Steam Navigation Co.* v. *Liverpool and London War Risks Insurance Association* [1921] 1 A. C. 99.

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by the House of Lords that a conclusion was reached on which side of the line the claim fell. There was another case of *The Warilda* (1), which was not decided in the House of Lords until 1923, and in the same year *The Geelong* (2) was also decided. It is said that during those years from July, 1917, onwards there was a tacit agreement, or at least acquiescence in the delay which took place in making any claim, for it had been indicated in the letter of August 27, 1917, to which I have referred, that the owners, when the matter had been fully considered, would notify the Admiralty if a claim was to be made upon the war risk policy. Those cases to which I have referred having been decided, a claim was made on August 14, 1923, on behalf of the marine underwriters that, the *Clan Maclachlan* being under requisition by the Minister of Shipping, was engaged on warlike operations when she was sunk, it having been discovered that she was carrying war material for the British Government. The representatives of the Admiralty did not accede to that claim or admit that they were in any way liable. Consequently, on November 29, 1923, the owners took the step of appointing an arbitrator in accordance with clause 31 of the charterparty. The Admiralty did not join in that procedure, and did not appoint an arbitrator on their side in accordance with the terms of the Arbitration Act, 1889, and therefore, in accordance with s. 6, sub-s. (*b*), of that Act, notice was given by the owners on December 10, 1923, of the appointment by them of Mr. Claughton Scott, the arbitrator they had selected and appointed, to act as sole arbitrator in the reference. Mr. Claughton Scott accordingly heard the reference and made his award in the form of a special case. It is only necessary to refer to two of his findings: (1.) "that at the time of the said loss Malta was a war base and the *Clan Maclachlan* was engaged in a warlike operation within the meaning of clause 19 of the said pro forma charterparty, namely in carrying war stores to a war base," and (2.) "that

(1) See *Attorney-General* v. *Adelaide Steamship Co.* [1923] A. C. 292.

(2) See *Commonwealth Shipping Representative* v. *P. & O. Branch Service* [1923] A. C. 191.

the said collision was a consequence of warlike operations within the meaning of the said clause 19." Upon those findings, therefore, it would appear that the Admiralty were liable under clause 19 of the policy which I have read. The Admiralty, however, claimed that they had a defence on the ground that the claim of the claimants was barred by the Statute of Limitations (21 Jac. 1, c. 16).

Before Mr. Claughton Scott the question of the actual amount of the loss was left over for determination either by agreement or by a second reference. The submission before him, however, included the question of the amount of the liability as well as the question of liability, and no point arises by reason of the fact that Mr. Claughton Scott did not in terms actually fix the quantum consequent upon the findings which I have read. Rowlatt J. decided that the claim was barred by the Statute of Limitations. He held that, when the Crown entered into the terms of the charterparty T.99 containing clause 31, they entered into it on the same basis as a subject, and that the Crown had a right to plead the statute in the same manner as a subject would have. His judgment was that although in terms the form of clause 31 is what may be shortly called a *Scott* v. *Avery* form, yet he held that the claim itself perished before it ripened into an award. In accordance with the decision of *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1), where it was held that the Limitation Act of James did apply to arbitrations, and that effect ought to be given to it in that case.

Upon appeal to this Court, Sir John Simon takes four points. His first is that the statute 21 Jac. 1, c. 16, does not apply to arbitrations at all, inasmuch as in terms it applies only to actions and suits, which do not include arbitrations. His second point is that clause 31 of the charterparty being what is termed a *Scott* v. *Avery* clause, the result is that the cause of action is not complete until the award is made, and that time under the statute does not begin to run until the award is published, and that the award in

(1) 68 L. J. (Q. B.) 252.

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this case was not in fact published until February 9, 1925. His third point was, that disregarding for the moment the question of the Crown being a party, if the arbitration was between two subjects and the Statute of Limitations did not apply to arbitrations, (*a*) an implied term could not be read into the agreement for reference that the arbitration must be brought within six years of the loss, and (*b*) such a term could not be implied where there was a *Scott* v. *Avery* clause and where power was given to appoint an arbitrator which could be forced on the other side under s. 6 of the Arbitration Act, 1889. His fourth point was that the Crown could not rely on 21 Jac. 1 ; that the Crown was not bound by the statute, and if it was not bound it could not rely upon or take advantage of a statute by which, correlatively, it was not bound.

It is obvious that the first, third and fourth points raise very difficult questions indeed. The first point involves the question whether *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1) was rightly decided ; the third point is dependent upon our reaching a decision on the first point, and the fourth point involves the question whether a dictum in the argument or in the judgment in the *Magdalen College Case* (2) is still law. That dictum has been found and repeated in a number of text-books, but Sir John Simon contends that upon a true investigation his point is good and that the passage usually relied upon in Chitty on the Prerogatives of the Crown is based on a misconception of what was decided in that case. (2) We are told, on the other hand, that the dictum in that case has been acted upon in other cases, and that, if it had been necessary for the Crown to argue that point, authority could have been produced, not merely from the text-books but from decisions which are binding on us on this point, to show that Sir John Simon's point is untenable. It is, however, unnecessary to go into those three questions, for the second point raised by Sir John Simon, if we agree with him, is conclusive of the case and would make any decision upon the three other points merely obiter.

(1) 68 L. J. (Q. B.) 252. (2) 11 Rep. 66*b*.

I turn, therefore, to the consideration of what is the effect of clause 31. The last words of that clause are: "It is further mutually agreed that such arbitration," by which, I think, is meant an arbitration which is concluded and ends in an award, "shall be a condition precedent to the commencement of any action at law." It is to be observed that those words contemplate that there may be an action at law, and that before such an action can be brought there must have been the fulfilment of a condition precedent—namely, a completed arbitration. In *Scott* v. *Avery* (1) the words are different, but it appears to me that their effect is the same. That case was one in which a decision was given in the House of Lords after the judges had been summoned and had given their opinions; four judges were in favour of the decision of the Exchequer Chamber, from which the appeal was taken, and three were in favour of reversing the decision of the Exchequer Chamber. I turn, however, to look at some observations made by three of the judges who were in favour of the maintenance of the decision of the Exchequer Chamber, the view which was ultimately accepted by the House of Lords. In that case Crowder J. says (2): "Collecting the substance of the contract from the allegations in the first count of the declaration and the sixth plea, it appears to me that no cause of action can arise before the sum to be paid is ascertained and settled by the arbitrator." Wightman J. says (3): "The only question in this case is whether the effect of the 25th rule of the association, referred to in the policy, is to withdraw the cognizance of the whole cause of action from the Courts of law, and to oust them of their jurisdiction, or only to impose upon the assurer a condition preliminary to his right to sue for a loss, that the amount of the loss shall be ascertained by arbitration." Cresswell J. says (4): "The very rule contemplates"—that is the rule which was embodied in the policy—"that an action is to be brought," and he says, "and by the contract itself obtaining a settlement of the claim, according to that

(1) 5 H. L. C. 811.
(2) Ibid. 824.
(3) 5 H. L. C. 831.
(4) Ibid. 836, 840.

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rule, is made a condition precedent to the right to maintain an action . . . . for after the settlement by arbitration it contemplates an action or suit on the policy, and not on the award." Turning to the speeches of the learned Lords who gave judgment in the case, it appears that Lord Cranworth says (1): "If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen," and he holds that here "that [amount] was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist." Lord Campbell says (2): "I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured." Further he says (3): "Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatsoever." It appears to me, from a consideration of those passages in *Scott* v. *Avery* (4) which are not based on a meticulous examination of the language of the rule which had to be construed, that the substance and meaning of clause 31 are definite and clear, that the arbitration and its result must be entered into and obtained as a condition precedent to the commencement of any action at law. If so, then it is abundantly plain from the section of the statute 21 Jac. 1, c. 16, that the time had not begun to run, because the words of the statute are "within six years next after such cause of action or suit," and if the cause of action is not complete until the award is made, the time has not begun to run.

But it is useful to look at one or two other cases in which the effect of *Scott* v. *Avery* (4) has been considered. In

(1) 5 H. L. C. 848, 849.
(2) Ibid. 852.
(3) 5 H. L. C. 854.
(4) Ibid. 811.

Horton v. *Sayer* (1) the matter was considered, and Pollock C.B., dealing with *Scott* v. *Avery* (2), says (3): "Even before the case of *Scott* v. *Avery* (2), there was a form in which a covenant, or condition, or proviso might be framed, which would prevent the parties from maintaining any action until the amount to be paid was ascertained by a third person; for instance, if there was a covenant to pay for building a house, or for the performance of any work, such a sum as A. B. should think reasonable, with a stipulation that the party who performed the work should not claim anything except what A. B. awarded; there the party could not maintain any action until A. B. had found what was due; for there would be no contract to pay in any other way." *Caledonian Insurance Co.* v. *Gilmour* (4), to which our attention has been called, is to the same effect. I forbear to quote the passages which have been cited in the course of the argument. Finally, I refer to *Spurrier* v. *La Cloche* (5), a case in the Privy Council, in which similar clauses or clauses to the same effect had to be considered, and Lord Lindley, who gives the judgment, says: "It follows from these observations that no action could be sustained in Jersey any more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: *Scott* v. *Avery* (2) and *Caledonian Insurance Co.* v. *Gilmour*. (4) The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract." He then refers to *Scott* v. *Avery* (2), not only in the House of Lords but to the manner in which Maule J. had put the matter in the Exchequer Chamber as right, where he said: "'There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency; but they cannot legally agree that when it is payable no action shall be maintained for it.'"

(1) (1859) 4 H. & N. 643.
(2) 5 H. L. C. 811.
(3) 5 H. L. C. 649.
(4) [1893] A. C. 85.
(5) [1902] A. C. 446, 450, 451.

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It appears to me that, after examining *Scott* v. *Avery* (1) and the other cases to which I have referred, it is impossible to distinguish the substance and effect of the latter part of clause 31 from the decision of *Scott* v. *Avery* (1), and that the words in that clause provide a condition precedent which must be fulfilled before the time begins to run. The result is that that condition not having been fulfilled until February 9, 1925, time has not run out under the Statute of Limitations so as to preclude the owners from pressing their claim.

I will only add a word or two as to the other cases which have been referred to, though it appears to me that not much help is to be gained from them. I agree that *Turner* v. *Midland Ry. Co.* (2) is not binding on us here. There, no compensation or right to be paid compensation arose until the actual amount of the compensation was estimated and determined. Again, in *Cheshire County Council* v. *Hopley* (3) the cause of action arose only when the sum in question was ascertained. *Coburn* v. *Colledge* (4) was a case upon a solicitor's bill of costs. There the cause of action arose when the services were rendered, and the impediment to the action was not fundamental to the cause of action but only a preliminary to the procedure under which the right of payment was enforceable.

It appears to me for these reasons that no question of the Statute of Limitations arises in this case. The other points do not arise and the claim of the owners succeeds.

The result is that the appeal must be allowed with costs.

SCRUTTON L.J. If it were necessary to decide all the points which were argued in this case undoubtedly we must have heard further argument from the Solicitor-General and it would have been necessary very carefully to consider the result, but in the view I take of the case it can be determined on one point only, and it is only necessary to express a reservation of one's opinion on the other two points.

(1) 5 H. L. C. 811.
(2) [1911] 1 K. B. 832.
(3) 130 L. T. 123.
(4) [1897] 1 Q. B. 702.

The case arises in this way. During the war the Government requisitioned a steamer, and they did so in these terms: they forwarded a requisitioning letter: "It has been found necessary to requisition the s.s. *Clan Maclachlan* for use on urgent Government service under the conditions of the pro forma charterparty T.99 enclosed," and, said in the letter, "Attached is also one copy of the pro forma charterparty T.99, terms of which apply, but it is not proposed at this juncture to enter into a formal charter." I personally have never been able to understand why the Government, which was going to pay large sums of money under requisitions, did not take the ordinary business precaution in those cases of signing a charter. If they had done so some Government official would not have been tempted to take the ridiculously unbusinesslike point that there was no submission in writing under which an arbitration could be entered upon. But for some reason the Government Department did carry out the transaction in that way. They sent a copy of the charter, the terms of which were to apply, but did not sign it. That charter provided that the Admiralty should not be liable for what may be described as marine risks happening to the steamer, but that they should be liable for what may be described as war risks, and the war risks were described in a form of language which has been of the greatest advantage to the legal profession, and has, I think, taken various shipowners to the House of Lords on no less than four occasions. Very soon after the ship had been requisitioned she was sunk by collision under circumstances which at the time rendered it very doubtful whether her sinking by collision was due to a marine risk or a war risk, and the Government Department said: "It is not understood on what grounds you are claiming this as a loss due to a war risk." A series of cases had been taken to the House of Lords before what, having regard to the language used, was undoubtedly a very difficult question was finally decided, and it was not until 1923, some six years after the ship had been lost, that it was decided in the circumstances under which the ship was lost the loss

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was not due to a marine risk which fell on the marine underwriters, but to a war risk which would ordinarily fall on the Crown.

Now what had happened when the ship was lost was that on August 21, 1917, the shipowners, writing to the Admiralty, said: "It is possible that the responsibility for the loss will fall to be dealt with as a war risk and we beg to give you notice of same," and again on August 27: "As soon as the position has been fully considered we shall further notify you if a claim on war risk policy is likely to be made." Sometimes the question which arose was between two sets of underwriters, war risk underwriters and marine underwriters, neither of them the Government. Sometimes the question which arose was between the Crown and the shipowner with the marine underwriters behind him. It was not until the cases of the *Warilda* (*Attorney-General* v. *Adelaide Steamship Co.* (1)) and the *Geelong* (*Commonwealth Shipping Representative* v. *P. & O. Branch Service* (2)) had been decided in the House of Lords in 1923 that any definite rule was laid down, and it was the Crown who were taking those cases to the House of Lords. Any delay was due to the wording of the charter and to the fact that the Crown was taking proceedings to the highest Tribunal. When, it having been finally settled that the case did fall within the terms of a war risk, the shipowners came and said: "Now will you pay us for the war risk under T.99?" somebody in a Government Department thought the proper position for the Crown, who had caused the delay by their unsuccessful contentions, to take up was to say "Statute of Limitations." I am sorry if the business of Government Departments is carried on in that way. Of course if the point is a good legal one the Crown is entitled to the benefit of it. But, in my opinion, it is a very bad business point. The question is not, however, whether it is a good business point but whether it is a good legal point.

The three points which were taken before us—they substantially resolve themselves into three—were, first of all,

(1) [1923] A. C. 292. (2) [1923] A. C. 191.

an arbitration having been set up under the clause in the charter, which I shall have to read, was the arbitrator in that arbitration, or are arbitrators generally, bound to apply the Statute of Limitations? Secondly, if the arbitrator was bound to apply the Statute of Limitations, in this particular case what was its effect where the arbitration clause in the charter in this case was so worded as to bring the case within the well known decision of the House of Lords in *Scott* v. *Avery*? (1) Thirdly, could the Crown rely on the maxim "Nullum tempus occurrit regi" and say: "No, we are not bound by the Statute of Limitations, but we can take advantage of it"? Those are the three points which emerge. I am not going to express a final opinion on the first point as to whether arbitrators generally are bound by the Statute of Limitations. I reserve myself liberty to consider when the case arises before this Court whether *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (2) was rightly decided. I think that question has not yet been properly considered, that it is a very difficult one, and probably one which does not admit of an absolute rule being laid down applicable to all arbitrations. There have been general statements for some time couched in very wide language that an arbitrator is bound by the rules of law. I find one in 1801, in *Aubert* v. *Maze* (per Chambre J.) (3): "There is no doubt that an arbitrator is bound by the rules of law like every other judge." I find another in this Court in *Jager* v. *Tolme & Runge* (per Swinfen Eady L.J.) (4): "The Council"—that was the council of the London Produce Clearing House—"are to give a decision—they are to decide—and in the absence of fuller and wider powers expressly given that means to decide according to the legal rights of the parties." On the other hand, I find there have always been cases where it is said that arbitrators are not bound by the rules acted upon in the High Court. I find in *In re Badger* (5) a statement in the headnote that "an arbitrator

(1) 5 H. L. C. 811.
(2) 68 L. J. (Q. B.) 252.
(3) (1801) 2 Bos. & P. 371, 375.
(4) [1916] 1 K. B. 939, 953.
(5) (1819) 2 B. & Ad. 691.

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is not bound by a rule of practice, adopted by Courts of law for general convenience; and, therefore, where on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest, (when it would not be allowed by a Court of law or equity) the Court refused to set aside the award on that ground."

We had a case the other day in the other Court of Appeal where the committee of Tattersalls sat as arbitrators to decide what was due on a bet, and they gave a decision. I do not know whether it is suggested that they were bound by the rules of law that no action would lie on a bet, and that consequently the arbitrators ought to have acted as if the arbitration was an action and ought not to have heard the case at all. I am acquainted with many arbitrations, where to avoid the rule that the Courts will not hear a case on a p.p.i. policy, the question what is due on the policy has been referred to arbitrators. I do not know whether it is to be said that in that case the arbitrators should not hear the case at all, because a policy which has a p.p.i. clause is not enforceable in any Court of law. I am not saying this for the purpose of expressing a final opinion, because in my view there is a great deal to be considered when the matter does come before this Court in a case which really raises the question. If an arbitrator is to be bound by the Statute of Limitations it must be by some implied term in the submission. He is not bound by the statute itself because the statute applies only to actions, and this arbitration is not an action, and it must be, therefore, suggested that there is some implied term in the contract that he shall give effect to such defence as there would have been if an action had been brought in the Courts. The submission does not say so, and one does not usually imply terms in submissions unless they are so necessary and so obvious that they must be taken to be part of the submission. From that point of view I say no more than that it is very doubtful in my judgment whether you can imply a term that the arbitrator is to take account of the Statute of Limitations as if he were trying an action.

But then comes the question whether, apart from the question whether the Statute of Limitations is applicable to arbitrations generally, the arbitrator is to give effect to the statute in this case. If he is to do so the effect is this, that it is a defence that more than six years have elapsed from the accruing of a complete cause of action before legal proceedings were begun to enforce it. If, therefore, you have a case where in fact the cause of action is only complete within six years from the time that the arbitrator has considered what decision he shall give, the Statute of Limitations does not apply. I see Rowlatt J. does not appear to think that there is any difference between a *Scott* v. *Avery* case and any other case, because he says of an action on an award that the cause of action is not complete until the award is given, and therefore if you are talking about actions on awards there is no difference between a *Scott* v. *Avery* case and any other case. As I understand it, the point is that we are not talking about actions on the award; we are talking about the cause of action which is being enforced in an action independently of an arbitration; and the difference between the *Scott* v. *Avery* case and the ordinary arbitration is that whereas in ordinary arbitrations you cannot bring an action at law, except by leave of the Court, because of the arbitration clause, in a *Scott* v. *Avery* case you cannot bring an action at law, because no cause of action arises until the award is in fact made. I think, if I may respectfully say so, that the flaw in Rowlatt J.'s judgment is that he has not appreciated the difference between a *Scott* v. *Avery* case and the ordinary case where there is no necessity to get the award of an arbitrator before bringing an action at law. The peculiarity of a *Scott* v. *Avery* case, as stated by Lord Campbell in *Scott* v. *Avery* (1), is this: "Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatsoever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action

(1) 5 H. L. C. 811, 854.

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accrues until the arbitrators have determined." The clause in the charter in this case, clause 31, is, though not quite in the ordinary *Scott* v. *Avery* form, substantially in the *Scott* v. *Avery* form: "Any dispute shall be referred to the arbitration of two persons, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law"—substantially the same as the *Scott* v. *Avery* case. Now if the arbitrator is bound to hear this arbitration as if the rules which apply to an action at law applied to it, what he has to do under the well known decisions is to ascertain when the cause of action was complete and to say whether those arbitration proceedings were started more than six years after the cause of action was complete. But in the *Scott* v. *Avery* case the cause of action is not complete until there has been an award of the arbitrator, and to such a case clearly it seems to me that the Statute of Limitations, even if applicable to arbitrations generally, has no application. On this point, which seems to me to be fatal to the claims of the Crown, I think that the learned judge was wrong, the arbitrator right, and the appeal succeeds.

The only remaining question, which is one of great historical interest and importance, is whether the Crown can successfully say: "We are not bound by the statute but we are at liberty to take advantage of it." At first sight such a statement appears somewhat strange. There is undoubtedly a long series of statements in text-books repeating each other for some centuries; but there is something to be said for the view argued by Sir John Simon that they start with a passage in an unsuccessful argument of a law officer which was not even relevant to the case before the Court, but which has been taken out by a text-writer and repeated for centuries until it was believed that it must have some foundation. Again, I have not heard the Solicitor-General on this point and, therefore, I am not going to say more than this, that it will need careful consideration when that question arises in a case in which it has to be decided, whether there is any foundation for this confidently repeated statement of text-writers except

the passage in the *Magdalen College Case* (1) and possibly a passage in 7 Rep. 32*a*, which is not the report of a case decided in the House of Lords, but the case of a private conference between the law officers and the Chief Justices of the Stuart Kings in a case in which the parties, the subjects affected by the decision which was given against them, were not present and were not heard. Which of the two is the more satisfactory foundation for the statement in the text-books I do not quite know, but the history of the story of the text-books will need to be carefully looked at when the question becomes material to be decided. It is not material in this case and, therefore, I say nothing more than there is ample material for considering the question when it has to be decided.

The appeal will be allowed, and I personally am not at all clear, in view of the course which has been adopted by the arbitrator on the agreement of the parties, as to what is to happen next, whether it is to go back to the arbitrator or how otherwise. Perhaps the parties can offer some suggestion.

ROMER J. Of the six contentions advanced before the arbitrator on behalf of the Crown one alone survives. In the special case it is stated in these terms : " That proceedings in the arbitration were not taken within six years after the date of the loss of the said steamship And that by reason thereof the claimants' claim was barred by the Statute of Limitations (21 Jac. 1, c. 16)." If this contention be taken literally it must obviously fail. The statute does not mention proceedings by arbitration and cannot apply to them.

I agree however with the Solicitor-General that the contention is not to be taken too literally, and that it ought to be treated as asserting that the arbitrator was bound to take the statute into his consideration, and that if he did so he ought to award that by reason of the statute the claimants are not entitled to recover anything from the Crown.

The argument in support of the contention so construed appears to be this. It is said that where litigation is pending

(1) 11 Rep. 66*b*.

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between two persons and they agree to refer their dispute to arbitration instead of having it determined by the Courts, every plea that was open to them had the matter proceeded in the normal way remains open to them before the arbitrator. If therefore the Statute of Limitations would have afforded a defence to the plaintiffs' claim in an action at law, it will equally afford a defence to the claim in the arbitration. This must, I think, be conceded. The arbitrator in such a case has by agreement between the parties been substituted for the Court, and he must decide as the Court itself would have decided.

It is next said that similar considerations apply to an arbitration held in pursuance of a clause in an agreement referring to arbitration all disputes that may arise thereunder between the parties, such clause not being what is called a *Scott* v. *Avery* clause. For myself I am inclined to agree that in general this would be so. I do not however think that it is necessary upon the present occasion to come to any definite conclusion upon the point or to express any opinion whether the *Astley Coal Co.* case (1) was rightly decided. I am content to assume the point in favour of the Crown. The next step in the argument on behalf of the Crown appears to me to enter upon even more debatable territory. It is said that even when the arbitration clause is in the *Scott* v. *Avery* form, it is still the duty of the arbitrator to consider whether the Statute of Limitations would be a bar to any proceedings by a claimant to enforce his claim at law, and that if the statute would be such a bar the arbitrator must make his award against the claim. This contention would seem to be in direct conflict with the opinion given by Cresswell J. when advising the House of Lords in *Scott* v. *Avery*. (2) Speaking of the clause in that case which provided that no member should be entitled to maintain any action at law or suit in equity on the policy until the matter in dispute should have been referred to and decided by the arbitrators and that the obtaining of the decision of the arbitrators was a condition precedent to the right of

(1) 68 L. J. (Q. B.) 252. (2) 5 H. L. C. 811.

any member to maintain any such action or suit, he said (1): "And this part of the rule, as to maintaining an action, shows that it was never intended to substitute the arbitrators for the Courts of law or equity, but to make them ancillary to an action or suit; for after the settlement by arbitration it contemplates an action or suit on the policy, and not on the award."

But let me again concede the point and assume, contrary to Cresswell J.'s opinion, that the arbitrator in the present case was substituted for the Courts of law and could award or not award a sum to the claimants according to whether a Court of law would or would not have given judgment in their favour. For even if all these assumptions be made in favour of the Crown, I am of opinion that the appellants' claim is not barred by the Statute of Limitations. The arbitration clause in this case appears to me to differ in no respect that is material to the present purpose from that in *Scott* v. *Avery* (2), as to which Lord Campbell made the observation referred to by Scrutton L.J. In my judgment we are bound by that case to hold in the present case that until the arbitrator makes his award no cause of action accrues to the claimants. That being so it necessarily follows that their claim has not been barred by the Statute of Limitations. I agree, therefore, that the appeal should be allowed with costs.

Appeal allowed.

Solicitors for appellants: *Ince, Colt, Ince & Roscoe.*
Solicitor for Board of Trade: *Solicitor to Board of Trade.*

(1) 5 H. L. C. 840. (2) 5 H. L. C. 811.

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Feb. 25, 26; *March* 10.

[IN THE COURT OF APPEAL.]

KURSELL *v.* TIMBER OPERATORS AND CONTRACTORS, LIMITED.

Sale of Goods—Contract for Sale of uncut Timber in Latvian Forest—Timber to be cut when Ripe—Cutting to be completed and Timber removed within fifteen Years—Possession taken by Purchasers—Subsequent Expropriation of Forest by Latvian Government—"Specific goods"—Frustration of Contract—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 17, 18, *r.* 1.

By the Sale of Goods Act, 1893, s. 17, sub-s. 1: "Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred." By sub-s. 2: "For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." By s. 18, r. 1: "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

By a contract dated September 10, 1920, the vendors agreed to sell and the purchasers to purchase all the merchantable timber growing on August 20, 1920, in the forest of Lühde in the Republic of Latvia. Merchantable timber was therein defined to be "all trunks and branches of trees but not seedlings and young trees of less than six inches in diameter at a height of four feet from the ground." The timber was to be cut not more than twelve inches from the ground. The purchasers were to have fifteen years in which to cut the timber, and were to have the use of the vendors' saw-mills, plant and huts, and the right to occupy every part of the forest. The price was 225,000*l.*, and the payments were to be made 15,000*l.* on each of the three quarter days in the year, and for the fourth quarter a sum equal to 4*l.* a standard of exportable timber cut in the forest during the year, less 45,000*l.* (the three previous instalments). The amount was to be certified by the authorized agents of the vendors and purchasers, the measurements having been agreed by them. The purchasers, unless prevented by some act or enactment of the Government of the country, or by force majeure, were to cut the timber at the rate of 15,000 standards per annum, and if they were so prevented, the fifteen years' period was to receive a corresponding extension of time. During the period of prevention the 15,000*l.* instalments of price were to be reduced to 4*l.* a standard of timber cut, carried away and sold or exported during the quarter.

On September 16 the Latvian Assembly passed an agrarian law, by which from October 1, 1920, the forest became the property of the Latvian State and the contract was annulled and all property and

rights of vendors and purchasers in the forest were confiscated. For the last five and a half years, therefore, it had been illegal to perform the contract in the place where alone it could be performed and the obstacle to its performance was continuing. The purchasers had paid 30,000*l.* to the vendors covering the first six months, and no question therefore arose that a default of payment of sums due had made the whole price payable:—

Held, that the contract was not a contract for the sale of specific goods in a deliverable state within the meaning of s. 18, r. 1, of the Sale of Goods Act, 1893; that the goods in question were neither identified nor agreed upon; that it was not every tree in the forest which passed, but only those complying with certain measurements not then made; that the timber was not in a deliverable state until the purchasers had severed it and that they could not under the definition in the rule be bound to take delivery of an undetermined part of a tree not yet identified, and accordingly that the property in the timber had not passed under s. 18, r. 1, and therefore that the timber was not at the risk of the purchasers.

Morison v. *Lockhart* 1912 S. C. 1017 followed.

Held, also, by Scrutton L.J., that even if the property in the timber had passed so much remained to be done under the contract that the doctrine of frustration would apply.

Metropolitan Water Board v. *Dick, Kerr & Co.* [1918] A. C. 119 applied.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. upon an award in an arbitration stated in the form of a special case under s. 7 (*b*) of the Arbitration Act, 1889.

By an agreement dated September 10, 1920, and made between the plaintiffs (thereinafter called "the vendors") of the one part and the defendants (thereinafter called "the purchaser") of the other part, the plaintiffs agreed to sell and sold and the defendants agreed to buy and bought at the price of 225,000*l.* all the merchantable timber growing on August 20, 1920, in the forest called Lühde, situate between the towns of Wolmar and Walk in the Republic of Latvia. The agreement provided that the purchaser was to have fifteen years within which to cut and remove it, and at the end of that time any timber uncut or not removed was to be forfeited to the vendors: "Provided however that if the purchaser shall be prevented by any act or enactment of the Government of the country de facto, or otherwise by force majeure, or by war from cutting the timber or from disposing of the timber so cut, then the said term of fifteen years shall

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be extended by a time equal to the duration of such prevention." By clause 10 the timber sold was to be felled, piled, sawn and removed—subject to the following stipulations: (1.) All trees should be felled so that the stumps thereof did not exceed twelve inches in height from the ground. (2.) The timber so collected as aforesaid should be measured before removal according to British customary methods, and the measurements agreed by the representatives of the vendors and the purchaser respectively. (3.) As soon as any section of the forest should have been cleared of merchantable timber the vendors should be at liberty to enter thereon for the purpose of replanting the same, provided that such replantings should not interfere with the efficient exploitation by the purchaser of the sections not so cleared. By clause 12 the timber was to be cut at the minimum rate of 15,000 standards per annum. By clause 13 30,000*l.* was to be paid down in cash or its equivalent on the signing of the agreement, the balance of 193,000*l.* was to be paid by quarterly instalments of 15,000*l.* with an adjustment in the case of each fourth instalment, or last annual payment, upon a certificate signed by the authorized agents of the vendors and purchaser; and by a proviso to the clause "in case any part of the timber hereby agreed to be sold shall be destroyed by fire during the said period of fifteen years . . . . the same shall be deemed to have been merchantable timber and to have been cut by the purchaser at the time when the same was destroyed and the amount so deemed to have been cut shall be such fraction of the total estimated number of standards of merchantable timber in the whole forest on 20th August, 1920, last as shall equal the fraction of the total area of the forest, the timber whereon shall have been so destroyed." By clause 19 the agreement was to be construed as an agreement made in England, and the rights of the respective parties were to be determined in accordance with the laws of England. By clause 1 (i.) merchantable timber was to mean and include all trunks and branches of trees, but not seedlings and young trees of less than six inches in diameter at a height of four feet from the ground.

The facts as found by the special case were as follows :—

(*a*) The forest of Lühde in the agreement of September 10, 1920, mentioned had an area of 9000 dessiatines or thereabouts. A dessiatine was a Russian measurement equal to 2.7 acres. A small part of the forest consisted of leafbearing trees ; by far the greater part consisted of conifers.

(*b*) The forest was estimated by the plaintiffs to contain 24,000,000 and by the defendants to contain about 33,000,000 or 34,000,000 cubic feet of timber ripe for cutting.

(*c*) The sum of 30,000*l.* part of the purchase money payable under the agreement was duly paid by the defendants to the plaintiffs in manner provided by clause 13 (i.) of the agreement. No further part of the purchase money had been paid.

(*d*) On September 15, 1920, the defendants were duly admitted by the plaintiffs into the forest and took possession of the timber, the subject-matter of the agreement.

(*e*) On or about October 2, 1920, the defendants began to cut the timber in pursuance of the agreement and continued so to cut the same until October 14, 1920. There was no evidence before the arbitrator as to the amount of timber so cut by the defendants.

(*f*) On October 14, 1920, the Government of Latvia by its agents in pursuance of the Lettish agrarian law passed on September 16, 1920, Part I. of which (being the relevant Part) came into operation on October 1, 1920, took possession of the forest and the timber therein.

(*g*) By virtue of the said law as from October 1, 1920, the forest and the timber therein became the property of the Latvian State and the agreement of September 10, 1920, became annulled, and all property and rights of the plaintiffs and the defendants in the forest and the timber therein became entirely confiscated to the Latvian State.

(*h*) Continuously until the present time (*a*) the said law had remained in force and (*b*) the Government of Latvia had remained in possession of the forest and (subject to the arrangement and agreement with the defendants hereinafter referred to) of the timber therein.

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(*i*) The defendants used all reasonable means to obtain from the Latvian Government recognition of the agreement of September 10, 1920, with a view to the agreement being carried into effect, but were unsuccessful in obtaining such recognition.

(*j*) The defendants recommenced felling timber in the forest about the end of October, 1920, and continued such felling until December 23, 1920. Such felling was done under a temporary arrangement with the Latvian Government made while negotiations were being carried on between the defendants and the Government for a formal contract between the defendants and the Government.

(*k*) On December 23, 1920, the defendants ceased felling timber in the forest in consequence of an order of the Latvian Government prohibiting any further felling therein. The defendants did not fell any timber in the forest after that date until January 21, 1921.

(*l*) On January 21, 1921, the defendants recommenced felling timber in the forest and continued to fell timber therein until March 9, 1921. From and after March 9, 1921, no timber was felled in the forest by the defendants or by their servants or agents.

(*m*) All the timber in the forest which was felled by the defendants on and after January 21, 1921, was so felled under and in pursuance of the agreement of that date specified in the schedule to the special case.

(*n*) As from October 14, 1920, no timber was felled in the forest under or in pursuance of the agreement of September 10, 1920.

(*o*) The total amount of timber in the forest felled by the defendants between the end of 1920 and March 9, 1921, was about 2,000,000 cubic feet.

(*p*) The defendants did not in regard to any matter relevant to the subject of the reference induce the plaintiffs to alter their position for the worse or to refrain from altering their position for the better.

(*q*) The risk of confiscatory legislation on the part of the Latvian Government to the detriment of British subjects

was mentioned in the course of the negotiations between the plaintiffs and the defendants leading up to the agreement of September 10, 1920, but such risk was treated in the course of such negotiations by both the plaintiffs and the defendants as being too remote to require consideration, and both parties entered into the agreement on the footing that there would be no such confiscatory legislation.

(*r*) Apart from the said Lettish agrarian law passed on September 16, 1920, there was nothing in any relevant law rendering the agreement of September 10, 1920, or the performance thereof in accordance with the terms thereof illegal or unenforceable by the plaintiffs.

The arbitrator declined to admit, as being irrelevant to any issue arising in the reference, evidence tendered by the plaintiffs for the purpose of showing that the defendants made considerable profits by the sale of timber cut under their arrangement and agreement with the Latvian Government.

The arbitrator awarded and determined (subject to the opinion of the Court on the questions of law thereinafter submitted)

1. That the agreement of September 10, 1920, was dissolved by frustration of its commercial object.

2. That no further part of the purchase money payable under the agreement beyond the sum of 30,000*l.* already paid thereunder was payable by the defendants to the plaintiffs.

3. That the claims of the plaintiffs in the arbitration failed.

The questions submitted by the arbitrator for the opinion of the Court were :—

1. Whether on the true construction of the agreement of September 10, 1920, and in the events which had happened the commercial object of the agreement was frustrated and the agreement became dissolved.

2. Whether on the true construction of the agreement and in the events which had happened the term of fifteen years mentioned in clause 3 of the agreement had become extended until the present time.

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If the Court should be of opinion as to either question in the affirmative then the award was to stand.

If the Court should be of opinion as to both questions in the negative then the arbitrator awarded and determined that the defendants should pay to the plaintiffs the sum of 195,000*l.*, together with interest thereon at the rate of 7 per cent. per annum from June 10, 1921, until the date of payment, and made a special order as to the costs of the award.

Rowlatt J., without deciding whether the property in the timber had passed, held that the responsibilities of the vendors under the agreement had not been fulfilled or completed on September 16, 1920, and that the agreement was dissolved by frustration of its commercial object.

The plaintiffs appealed. The appeal was heard on February 25, 26, 1926.

Maugham K.C., *Barrington-Ward K.C.* and *E. F. Spence K.C.* for the appellants.

Clauson K.C. and *D. N. Pritt* for the respondents.

The arguments sufficiently appear from the judgments.

[The following cases were referred to: *James Jones & Sons* v. *Earl of Tankerville* (1); *Taylor* v. *Caldwell* (2); *Ralli Brothers* v. *Campañia Naviera Sota y Aznar* (3); *Morison* v. *Lockhart* (4); *Tarling* v. *Baxter* (5); *Rugg* v. *Minett* (6); *Royse* v. *Birley* (7); *Metropolitan Water Board* v. *Dick, Kerr & Co.* (8); *Blackburn Bobbin Co.* v. *T. W. Allen & Sons.* (9)]

Cur. adv. vult.

March 10. The following written judgments were delivered:—

LORD HANWORTH M.R. This is an appeal from a judgment of Rowlatt J. given on December 2, 1925, upon an award in an arbitration between the above parties stated in the

(1) [1909] 2 Ch. 440.
(2) (1863) 3 B. & S. 826, 833.
(3) [1920] 2 K. B. 287.
(4) 1912 S. C. 1017; 49 S. L. R. 865.
(5) (1827) 6 B. & C. 360.
(6) (1809) 11 East, 210.
(7) (1869) L. R. 4 C. P. 296.
(8) [1918] A. C. 119.
(9) 1918] 2 K. B. 467.

form of a special case under s. 7 (*b*) of the Arbitration Act, 1889.

Two questions were propounded in the case for the opinion of the Court. The meaning and purport of the second question is not easy to follow. Probably at the time it was suggested and framed, it had special relevance to some points raised at the arbitration, and seemed to raise correctly the point on which a decision was invited, though it is somewhat obscure now. However, it is not necessary to discuss it or deal with it, for counsel for the appellants agree that unless the first question is answered in their favour their appeal fails.

By an agreement made between the parties and dated September 10, 1920, the Timber Operators and Contractors, Ld.—the respondents to the appeal, who were, and herein will be called "the purchasers"—made a contract with the appellants, who were the owners and will be called herein "the vendors," as to some timber then standing uncut in the forest of Lühde in the Republic of Latvia.

From the facts found and stated in the case by the learned arbitrator, it appears that on September 16, 1920, the purchasers were duly admitted by the vendors into the forest, and took possession of the timber, the subject-matter of the agreement, and that they began to cut the timber on October 2, and continued to cut it until October 14, 1920; but the amount so cut cannot be determined, and since the latter date no timber has been felled under, or in pursuance of, the agreement of September 10.

On September 16, 1920, an agrarian law was duly passed in Latvia, and the relevant part became effective on October 1, 1920. By virtue of this law, as from October 1, 1920, the forest of Lühde, and the timber therein, became the property of the Latvian State and the agreement of September 10, 1920, became annulled, and all property and rights of the vendors and purchasers in the forest, and the timber, became entirely confiscated to the Latvian State. On October 14 the Government of Latvia by its agents took possession of the forest and the timber therein.

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Lord Hanworth M.R.

Continuously to the present time, the said law has remained in force and the Government of Latvia has remained in possession of the forest and the timber, and the purchasers have failed to secure recognition of the agreement of September 10, 1920, by the Latvian Government.

The risk of confiscatory legislation by the Latvian Government, to the detriment of British subjects, was mentioned in the course of negotiations between the parties leading up to the agreement of September 10, 1920; but was treated as too remote to require consideration. The total sum payable by the purchasers to the vendors under the agreement was 225,000*l.*; of this sum 30,000*l.* was duly paid by the purchasers as provided by clause 13, sub-clause 1, of the agreement. The balance of 195,000*l.* was payable by instalments. By clause 3 of the agreement the purchaser was to "have fifteen years within which to cut and remove from the forest the whole of the timber agreed to be sold."

The purchasers claim that in the events which happened the commercial object of the agreement has been frustrated, and that it became dissolved in accordance with the principle adopted in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) The vendors do not contend otherwise, unless under the agreement the property in the timber sold passed, so as to render the contract between them executed in the sense that there is nothing left to be done under it by the vendors, except to receive the balance of the purchase money.

They claim that the relation of the parties was no longer that of contractors bound, inter se, by the terms of the contract; but was only that of creditor and debtor in accordance with the principle stated by Montague Smith J. in *Royse* v. *Birley*. (2) Putting it in another way, the vendors claim that an immediate sale of the timber was effected on September 10, 1920, and that their right to payment accrued at once, although such payment was to be made by instalments and deferred over a period of time—that the illegality supervened subsequently, and that the purchasers are not discharged from their obligation as in accordance with the

(1) [1918] A. C. 119. (2) L. R. 4 C. P. 296, 310.

doctrine of *Taylor* v. *Caldwell* (1): see per Blackburn J. (2) and see also *Blackburn Bobbin Co.* v. *T. W. Allen & Sons.* (3)

It is thus necessary to examine the agreement of September 10, 1920, to ascertain whether the property passed.

It may be stated, that subject to the case stated, the learned arbitrator held that the agreement of September 10, 1920, was dissolved by the frustration of its commercial object. The learned judge, without deciding whether the property in the timber had passed, held that the responsibilities of the vendors under the contract were by no means fulfilled or completed on September 16, and he found it to be a case of frustration—that the whole substratum of the contract had gone.

The terms of the agreement may be summarized shortly as follows. [His Lordship shortly stated the material provisions of the agreement as above set out, and referring to the definition of merchantable timber in clause 1, sub-clause 1, thereof continued:] Taking this interpretation and bearing in mind that under clause 10, sub-clause 3, the vendors have a right to replant any section of the forest then cleared of merchantable timber, I do not accept the construction of clause 2 suggested by the vendors—namely, that what is or is not merchantable timber was to be determined and fixed as on August 20, 1920. Such a construction offers many practical difficulties. Ten years hence it may be difficult to decide whether a tree had been of not less than six inches in diameter on August 20, 1920, nor will it be easy to determine at what point on the bark the measurement is to be taken, for undergrowth or detrition may have altered the point from which the four feet is to be measured.

In my judgment the determination of what trees fulfil the definition of merchantable timber is to be determined from time to time, as and when it is proposed to fell them and the words "growing on the 20th August, 1920," are inserted in order to lay down the condition that such trees must have been part of the forest growing at the date, and not part of

(1) 3 B. & S. 826. (2) 3 B. & S. 833.
(3) [1918] 2 K. B. 467.

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those replanted later under clause 10, sub-clause 3, some of which might reach the required measurements in the course of the lapse of twelve or fourteen years from their planting by the vendors. This conclusion negatives the contention that the agreement of September 10, 1920, made a sale of specific or ascertained goods. The definition of specific goods in s. 62 of the Sale of Goods Act, 1893, is: "'Specific goods' means goods identified and agreed upon at the time a contract of sale is made." It is clear that this definition will not fit trees of which it cannot be determined that they are merchantable and within the contract until the time for felling them has approached and when the time for their measurement has arrived—that may be any number of years up to nearly fifteen after the contract was made.

It is not necessary, however, to base my judgment upon this point of interpretation of its terms alone. From a careful study of the agreement, and in particular the clauses which I have set out above, I have come to the conclusion that the agreement was not executed on the part of the vendors at its date. They still had to agree the timber to be cut, its measurement when cut, and its value, and the instalments due in respect of it.

The question whether the property in the timber then passed depends first upon whether it is "specific or ascertained goods" within s. 17 of the Sale of Goods Act, 1893, and next if it be such, whether the parties intended the property in it to be transferred.

Further, by sub-s. 2: "For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

The law as stated in the code is similar to the proposition as to the passing of the property in specific and ascertained goods laid down in his judgment in *Heilbutt* v. *Hickson* (1) by Bovill C.J., where he adds "unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser. Such

(1) (1872) L. R. 7 C. P. 438, 449.

an intention is generally shown by the fact of some further act being first required to be done; such as, for instance, in most cases, delivery—in some cases, actual payment of the price—and in other cases, weighing or measuring in order to ascertain the price, or marking, packing, coopering, filling up casks, or the like."

In my judgment the terms of the agreement point to such other circumstances, and negative the intention that the property should at once, on the execution of the agreement, vest in the purchaser. The case is very different from *Tarling* v. *Baxter* (1), which was much pressed upon us, where a haystack standing in a field was sold and paid for by a bill of exchange and afterwards lost by fire. In that case however the same principle stated in *Heilbutt* v. *Hickson* (2) and in the code is referred to: "In the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer . . . . but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done": see per Holroyd J. (3)

Coming to the actual subject-matter of the sale in the present case, authority is not lacking that although for some purposes fictione juris the tree may be treated as divided from the freehold, yet in fact and in truth the vendor cannot take them before severance: "for it was said, that timber trees cannot be felled with a goose-quill": see 11 Co. Rep. 46*b*, 50*a*, quoted in Benjamin on Sale, 6th ed., p. 218*n*.

This appears to be authority for Parker J.'s dictum in *James Jones & Sons* v. *Earl of Tankerville* (4): "A contract for the sale of specific timber growing on the vendor's property, on the terms that such timber is cut and carried away by the purchaser, certainly confers on the purchaser a licence to enter and cut the timber sold, and, at any rate as soon as the purchaser has severed the timber, the legal

(1) 6 B. & C. 360.
(2) L. R. 7 C. P. 438.
(3) 6 B. & C. 360, 365.
(4) [1909] 2 Ch. 440, 442.

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property in the severed trees vests in him": see also *Morison* v. *Lockhart.* (1)

The contention of the vendors appears to strain the agreement in their favour, and to leave out of sight many important terms which remained to be operative on their part during its continuance.

It is in my judgment impossible to hold that the intention of the parties was that the property passed immediately at the date of the agreement. For these reasons, therefore, I am unable to answer the first question favourably to the vendors, with the result that their appeal fails and must be dismissed with costs.

SCRUTTON L.J. This appeal from the decision of Rowlatt J. on a case stated by a legal arbitrator involves the effect on the purchase of a forest in Latvia of a Latvian law appropriating the forest and annulling all private rights in relation to it. The vendors sue for the price of the forest on the ground that the property in it has passed to the purchasers, and any subsequent loss of the subject-matter is for the purchasers' account. The purchasers reply that the property has not passed; and that if it has, the contract is void by frustration. The arbitrator and Rowlatt J. have decided in favour of the purchasers' contention. The contract in question was made on September 10, 1920, and provided for the sale of all merchantable timber growing in a specified forest on August 20, 1920. Merchantable timber was defined as "all trunks and branches of trees but not seedlings and young trees of less than six inches in diameter at a height of four feet from the ground." The timber was to be cut not more than twelve inches from the ground. The measurement of the trunk was, therefore, uncertain till cutting. The purchasers had fifteen years in which to cut the timber, and were to have the use of the vendors' saw-mills, plant and huts, and the right to occupy every part of the forest. The price was 225,000*l.*, and the payments were to be made 15,000*l.* on each of the first three quarter days in the year,

(1) 1912 S. C. 1017; 49 S. L. R. 865.

and for the fourth quarter a sum equal to 4*l.* a standard of exportable timber cut in the forest during the year, less 45,000*l.* (the three previous instalments). The amount was to be certified by the authorized agents of the vendors and purchasers, the measurements having been agreed by them. The purchasers, unless prevented by some act or enactment of the Government of the country, or by force majeure, were to cut timber at the rate of 15,000 standards per annum, and if they were so prevented, the fifteen years' period was to receive a corresponding extension. During the period of prevention the 15,000*l.* instalments of price were to be reduced to 4*l.* a standard of timber cut, carried away and sold or exported during the quarter. So long, therefore, as there was complete prevention, no price would be payable.

The contract having been made on September 10, on September 16 the Latvian Assembly passed an agrarian law, by which from October 1, 1920, the forest became the property of the Latvian State and the contract was annulled and all property and rights of vendors and purchasers in the forest were confiscated. In other words, for the last five and a half years it has been illegal to perform the contract in the place where alone it can be performed; and the obstacle to performance is continuing. A small quantity of timber was cut between October 2 and 14, 1920, amount unknown; but as the purchasers have paid 30,000*l.* to the vendors covering the first six months, it is not possible to argue that a default of payment of sums due has made the whole price payable.

What is the legal result of these facts? In the first place has the property passed? It was said that this was a contract for the sale of specific goods in a deliverable state under s. 18, r. 1, of the Sale of Goods Act. Specific goods are defined as goods identified and agreed upon at the time a contract of sale is made. It appears to me these goods were neither identified nor agreed upon. Not every tree in the forest passed, but only those complying with a certain measurement not then made. How much of each tree passed depended on where it was cut, how far from the ground. Nor does the

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timber seem to be in a deliverable state until the buyer has severed it. He cannot under the definition be bound to take delivery of an undetermined part of a tree not yet identified. I refer to and adopt Lord Johnston's discussion of a similar question in the Scotch case of *Morison* v. *Lockhart*. (1)

For these reasons in my opinion the property had not passed under s. 18, r. 1, and, therefore, the timber was not at the risk of the purchasers.

Even if it had passed, I agree with the view of Rowlatt J., that so much remained to be done under the contract that the doctrine of frustration would apply. That doctrine depends on whether in the particular contract there is an implied term that its validity shall depend on the continued existence of some thing, or state of facts or law. Here I think it is clear that the continued existence, apart from temporary interruptions, of a state of law in which the contract could be performed was contemplated by the parties. The arbitrator finds that both parties entered into the agreement on the footing that there would be no confiscatory legislation. It is true that there are provisions for extension of the contract period in case of temporary prevention; but so there were in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2), where the House of Lords held the prevention sufficiently substantial and permanent to frustrate the performance of the contract. I asked counsel for the vendors what would happen if the Latvian legislation remained valid for forty years, with no cutting and no payment of price instalments. He was, I think, inclined to agree that there would be an end to the contract. If so, it is a question of degree and fact whether the prevention is sufficiently permanent to defeat the adventure and make it a different adventure from that which the parties contemplated. The arbitrator has found frustration; and as absolute prevention has now lasted for five and a half years, and there is no sign of it ceasing, we cannot possibly interfere with his finding.

(1) 1912 S. C. 1017; 49 S. L. R. 865.

(2) [1918] A. C. 119.

I would add that I think the same result would follow under the decision of this Court in *Ralli Brothers* v. *Campañia Naviera Sota y Aznar* (1) from the fact that performance of the contract is at present permanently illegal in the place where the greater part of the contract is to be performed. The appeal must be dismissed with costs.

SARGANT L.J. The argument for the appellants here has been based on establishing that, under the contract in question, there was an immediate transfer to the purchasing company of the property in the timber forming the subject-matter of the contract. For, though there was no admission by the appellants that such an immediate passing of the property was an essential (though not a sufficient) condition of their success, they deliberately abstained from arguing that they could succeed on any other view of the matter. It is, therefore, necessary in the first place to consider whether the contract effected an immediate transfer of the property in the timber to the respondents; and this, in my judgment, depends upon whether, under r. 1 in s. 18 of the Sale of Goods Act, 1893, the contract was one for the sale of specific goods in a deliverable state. This question again divides itself into two heads—namely, first, was the timber agreed to be sold specific goods; and, secondly, was it in a deliverable state?

As to the first head, there is a curious ambiguity in the wording of the contract. The merchantable timber sold is obviously limited to trees planted at the date of the contract, and does not include any trees subsequently planted. But is it limited to such of these existing trees as were merchantable (that is of the required size) at the date of the contract; or does it include trees which being unmerchantable at the date of the contract become merchantable at that period of the subsequent fifteen years when the purchasers come to exercise their right of felling? The former construction is one that is more in accordance with a very strict view of the language of the contract, but it would necessarily involve such

(1) [1920] 2 K. B. 287.

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extreme and obvious difficulty in the working out of the contract, that I am for myself inclined to adopt the second of these two constructions.

If then this view is correct it seems hopeless to contend that the timber sold was specific, for the items of timber sold depend upon the rate of growth of the trees, and the time at which the purchasers come to fell the various sections of the forest. Accordingly the appellants contended strenuously that the date for ascertaining the size of the trees was the date of the contract. And I will consider the question whether the goods sold were specific on this view of the construction, which is the more favourable to the appellants.

Even on this view, however, I cannot think that the timber sold was at the date of the contract identified, or more than merely identifiable; and in order that goods may be specific they must in my view be identified and not merely identifiable. The appellants relied on the maxim "Id certum est quod certum reddi potest"; but I do not think that this maxim applies in the present connection. The future book debts which were assigned in *Tailby* v. *Official Receiver* (1) were identifiable, and so were held to be subject-matter for a good equitable assignment which prevailed against the Official Receiver; but they certainly were not identified or specific at the date of the assignment. For the purpose of the passing of the actual property in goods as distinguished from a right to ultimately claim a title to the goods as against the vendor or volunteers under him, a present identification of the goods as specific goods appears to be required by the statute. There must be a transfer of the right in re not merely of the right ad rem.

Further I am of opinion that under the contract in question the timber sold did not form goods in a deliverable state. I am content on this point to adopt the views of Lord Johnston in the Scotch case of *Morison* v. *Lockhart*. (2)

In the view I have taken, it is unnecessary to consider whether the doctrine of frustration would have applied even

(1) (1888) 13 App. Cas. 523. (2) 1912 S. C. 1017; 49 S. L. R. 865.

if the property in the timber had passed to the purchasers, though I do not desire to express any doubt as to the decision on this point also of the learned judge.

Appeal dismissed.

Solicitors for appellants: *Bull & Bull.*

Solicitors for respondents: *Lawrence Jones & Co.*

W. I. C.

LEYTON URBAN DISTRICT COUNCIL, APPELLANTS *v.* WILKINSON, RESPONDENT.

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Justices — Appeal — Case stated — Recognizance — Appeal by Corporation —Recognizance entered into by Clerk personally—Summary Jurisdiction Act, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 3.

By s. 3 of the Summary Jurisdiction Act, 1857, "the appellant, at the time of making such application [for the stating of a case by justices], and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognizance, before such justice or justices . . . . with or without surety or sureties, and in such sum as to the justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior Court, and pay such costs as may be awarded by the same. . . . ."

A local authority commenced proceedings in its own name before justices under the Public Health Acts to recover certain expenses which had been incurred by the authority in doing certain work. The clerk to the local authority, being dissatisfied with the decision of the justices, applied to them for a case to be stated for the opinion of the High Court, and entered into a recognizance in his own name in a sum to be levied on his goods and chattels if he failed in the condition indorsed thereon, which was that he should prosecute without delay his appeal and submit to the judgment of the Court and pay such costs as might be awarded:—

Held, that the recognizance did not satisfy the requirements of s. 3 of the Summary Jurisdiction Act, 1857, inasmuch as it was not entered into for or on behalf of the local authority nor did it purport to bind the goods and chattels of the local authority, and that therefore, as the condition precedent to the statement of a case had not been complied with, the appeal must be dismissed.

The Court expressed the opinion, without deciding the point, that a corporation is not excused in such a case from entering into a recognizance.

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APPEAL from Essex justices.

A complaint was preferred by the appellants, the Leyton Urban District Council, under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Acts Amendment Act, 1890, against the respondent, C. T. Wilkinson, claiming the sum of 51*l.* 15*s.* 7*d.*, being the amount of expenses incurred by the appellants in relaying certain defective branch drains to premises owned by the respondent, and also a single private drain at the rear of the said premises. The justices ordered the respondent to pay the sum of 27*l.* 19*s.* 11*d.*, the cost incurred by the appellants in relaying the branch drains, but they refused to make an order for the payment of the cost incurred by the appellants in respect of the single private drain.

The clerk to the Leyton Urban District Council being dissatisfied with the said determination as being erroneous in point of law, applied to the justices pursuant to s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879, to state a case for the opinion of the High Court, and he entered into the following recognizance to prosecute the appeal and to submit to the judgment of the superior Court and to pay such costs as might be awarded :—

"Be it remembered that on the 26th day of May, 1926, John Atkinson, of Town Hall, Leyton, clerk to the Leyton Urban District Council, personally came before me, one of His Majesty's justices of the peace for the said county, and acknowledged himself to owe our sovereign lord the King the sum following, namely, the sum of one hundred pounds, to be levied on his several goods and chattels, lands and tenements, if he the said principal fail in the condition hereon indorsed."

The condition of the recognizance was that "If therefore the said John Atkinson, after the said court of summary jurisdiction shall have stated a case setting forth the facts and the grounds thereof as aforesaid for the opinion of the said Court, shall prosecute without delay such his appeal and submit to the judgment of the said Court thereon, and

pay such costs as may be awarded by the same, then the said recognizance to be void or else to stand in full force and virtue."

The justices stated a case for the opinion of the High Court.

Montgomery K.C. and *William Allen* for the appellants.

Sir James O'Connor K.C. and *G. W. H. Jones* for the respondent. There is a preliminary objection to the hearing of the appeal in that the condition precedent to the stating of the case required by s. 3 of the Summary Jurisdiction Act, 1857, has not been complied with. That section requires that the appellant, at the time of making his application for a case to be stated, and before the case is stated by the justices, shall in every instance enter into a recognizance in such sum as to the justices shall seem meet to prosecute without delay such appeal and to submit to the judgment of the superior Court and to pay such costs as may be awarded. The first question is whether the provisions as to recognizances apply to corporations, and if so what are the formalities which must be complied with. It was assumed in old cases that inasmuch as a corporation cannot appear in person it cannot enter into a recognizance at all. There is a dictum to that effect in an anonymous case in 6 Eliz. (1) That dictum was doubted by Bayley J. in *Cortis* v. *Kent Waterworks Co.* (2), where he said that he would pause before he said that a corporation is not competent to enter into a recognizance. He was not satisfied that a corporation might not appoint an attorney for the purpose of entering into a recognizance.

[*Montgomery K.C.* A recognizance has been entered into by the clerk to the Leyton Urban District Council.]

That recognizance does not comply with the requirement of the statute, inasmuch as it is not correct in form. It is a personal recognizance by the gentleman entering into it, and only purports to bind his goods and chattels and not the goods and chattels of the appellants. The statute says

(1) (1564) Moore, 68, pl. 182. (2) (1827) 7 B. & C. 314, 331.

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that the appellant shall enter into the recognizance and admit his obligation to the King. In the present case the appellants have not entered into any recognizance at all. In *Rex* v. *Inhabitants of Abergele* (1), which was an application for a certiorari by the inhabitants of a parish, it was held that the recognizances for prosecuting such appeal must be entered into by one or more of the inhabitants on behalf of themselves and the other parishioners, and also by sureties. That shows that the recognizance ought to have been entered into by Atkinson on behalf of the urban district council, whereas in fact it was entered into by him personally as if he were the appellant, and it only binds his goods and chattels. It was held in *Southern Counties Deposit Bank* v. *Boaler* (2) that in the case of corporations it is the practice to accept the recognizances of some member of the body, usually a director. The present case does not come within s. 259 of the Public Health Act, 1875, which authorizes the clerk of a local authority to institute and carry on any proceedings which the local authority is authorized to institute and carry on, because these proceedings were instituted in the name of the appellants and not in the name of the clerk.

Montgomery K.C. The recognizance which has been entered into is adequate in form, being made on a stock form. The practice is for an officer of a local authority to enter into a recognizance on behalf of the local authority, but it is doubtful whether he could bind the goods and chattels of the local authority. The person entering into a recognizance must make himself personally liable under it. It would be very inconvenient if the clerk to a local authority could not enter into a recognizance so as to enable an appeal by the local authority to proceed.

[LORD HEWART C.J. The point made against you is that the recognizance is not good, because the clerk entered into it personally and bound his own goods only.]

It was entered into by him as clerk of the urban district council. The appeal is the appeal of the local authority.

[AVORY J. The recognizance does not show that. It would

(1) (1836) 5 Ad. & E. 795. (2) (1895) 11 Times L. R. 568.

appear from the wording of the recognizance to be the appeal of the clerk.]

The appeal is the appeal of the local authority; the recognizance was entered into by John Atkinson in his capacity as the clerk of the local authority. A corporation may appoint an attorney for the purpose of entering into a recognizance: *Cortis* v. *Kent Waterworks Co.* (1) A corporation cannot enter into a recognizance, and s. 3 of the Summary Jurisdiction Act, 1857, does not apply to corporations, for that section provides for a case where an appellant is in custody, and a corporation cannot be in custody.

[AVORY J. The London County Council thought it necessary to obtain a statute exempting them from the necessity of entering into recognizances: see the London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 11. If corporations cannot enter into recognizances where was the need for that exemption?]

It was done to get rid of any possible doubt.

LORD HEWART C.J. In this case I think the preliminary objection ought to be upheld. By s. 3 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), it is provided with reference to an application for the stating of a case by justices that "the appellant, at the time of making such application, and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognizance, before such justice or justices, or any one or more of them, or any other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior Court, and pay such costs as may be awarded by the same; and the appellant shall at the same time, and before he shall be entitled to have the case delivered to him, pay to the clerk to the said justice or justices his fees for and in respect of the case and recognizances. . . ." In other words the procedure is made by the statute

(1) 7 B. & C. 331.

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a condition precedent to the stating of a case. The words of the statute are that "the appellant . . . . shall in every instance enter into a recognizance." In the present case the objection is taken that the appellants, the Leyton Urban District Council, have not entered into any recognizance at all. The question whether a corporation is excused from entering into a recognizance in such a case has not been fully argued for the reason that at an early stage that point seems to have been conceded. But as far as the argument proceeded it seems to me that the burden is upon the party that contends that a corporation is excused to establish that proposition. No authority has been cited in support of that proposition. Reference has been made to *Cortis* v. *Kent Waterworks Co.* (1) Bayley J. in his judgment in that case used these words (2): "It is said, however, in this case, that it must be collected from the appeal clause of this Act that corporations were not intended to be included, inasmuch as the person or persons appealing against a rate are required to enter into a recognizance, and that a corporation cannot do so. If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognizance. I am aware that there is a dictum (3) to show that they cannot do so; but as they may appoint an attorney for a variety of purposes, I am not satisfied that they may not do so for the purpose of entering into a recognizance." That observation was made so long ago as 1827, nearly a century ago, and notwithstanding the lapse of time no authority has been produced in support of the proposition that a corporation is excused from entering into a recognizance. On the contrary it is admitted that corporations have in such cases entered into recognizances.

The second point is that the recognizance which has been entered into does not satisfy the requirements of the statute. The original document is now before me, and it is clear that it is not a recognizance entered into for and on behalf of

(1) 7 B. & C. 314. (2) 7 B. & C. 330.
(3) Moore, 68, pl. 182.

the Leyton Urban District Council. It is entered into by a gentleman named John Atkinson, who is described as being the clerk of the Leyton Urban District Council; but he is not described as entering into the recognizance for and on behalf of the district council. The recognizance is entered into by John Atkinson on behalf of himself, because it says that he "acknowledged himself to owe our sovereign lord the King . . . . the sum of 100*l.*, to be levied on his several goods and chattels, lands and tenements, if he the said principal fail in the condition hereon indorsed." Similar language is used throughout the document. In the condition the appeal is spoken of as being "his appeal"—namely, the appeal of John Atkinson. We were told that the form of recognizance used is a stock form. It is true that a considerable portion of it is in print, but these words which I have referred to are written in. It was open to the persons concerned to write in words which were more suitable to the purpose for which the recognizance was entered into. The sum of 100*l.* which John Atkinson expressed himself by the recognizance to owe the King was "to be levied on his several goods and chattels, lands and tenements, if he the said principal fail in the condition hereon indorsed." That condition is to "prosecute without delay such his appeal and submit to the judgment of the said Court thereon, and pay such costs as may be awarded by the same." Suppose circumstances arose in which the sheriff levied upon the goods and chattels, lands and tenements of John Atkinson, could it be said in face of the recognizance—it was hardly suggested—that Mr. John Atkinson would have a right of action against the sheriff? Neither could the sheriff in face of the recognizance levy upon the goods and chattels of the Leyton Urban District Council. In my opinion therefore this recognizance is not such a recognizance as is required by s. 3 of the Summary Jurisdiction Act, 1857. It would not have been difficult by a slight variation in the words used to make it plain that the recognizance was being entered into by Mr. Atkinson for and on behalf of the Leyton Urban District Council, that it was their recognizance and bound

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their goods and chattels, and that it was their appeal that was being prosecuted.

For these reasons the preliminary objection ought in my opinion to succeed, and the appeal ought to be dismissed.

AVORY J. I am of the same opinion. I will only add, in order to show that the point has not been overlooked, that I do not think s. 259 of the Public Health Act, 1875, can be prayed in aid by the appellants. The material words of that section are: "Any local authority may appear before any court, or in any legal proceeding by their clerk . . . . and their clerk . . . . shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute and carry on under this Act." Those words do not, in my opinion, entitle the clerk to a local authority to enter into a recognizance in his own name to prosecute an appeal, and to make himself liable for costs under s. 3 of the Summary Jurisdiction Act, 1857, in a case to which he is not a party.

SALTER J. I agree.

Preliminary objection upheld.
Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for John Atkinson, Leyton.*

Solicitors for respondent: *Appleton & Co.*

R. F. S.

[IN THE COURT OF CRIMINAL APPEAL.]

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Feb. 8, 9.

THE KING *v.* DAVID DUNKLEY.

Criminal Law—Evidence—Nature or Conduct of the Defence—Imputation on Character of Witness for Prosecution—Evidence of Person charged—Cross-examination as to previous Convictions—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.

The appellant was charged with stealing and receiving certain property. A witness for the prosecution gave evidence that the appellant brought the articles to her and asked her to dispose of them. In cross-examination it was suggested to the witness that her story was a pure invention fabricated out of a feeling of revenge against the appellant. The appellant himself in evidence said that the story of the witness was not true and was due to malice:—

Held, that the statement made by the appellant and the suggestions made on his behalf in cross-examination of the witness for the prosecution that her evidence was a pure invention on her part due to malice, were imputations upon the character of a witness for the prosecution within s. 1 (*f*) (ii.) of the Criminal Evidence Act, 1898, so as to render the appellant liable to be cross-examined as to previous convictions.

APPEAL against conviction and sentence.

The appellant, David Dunkley, was indicted at the County of London Sessions for breaking and entering a warehouse and stealing and receiving certain property in that warehouse. He was convicted of receiving and was sentenced to fifteen months' imprisonment with hard labour. He appealed against both the conviction and the sentence.

The facts as shown by the evidence were, shortly, that in the early morning of October 20, 1925, a warehouse in Liverpool Road was broken into. The safe was taken from the office into the basement and was broken open, and a valley charger and an accumulator belonging to the occupier of the warehouse, a Mr. Fennimore, were stolen, and also there was stolen a bicycle belonging to a Mr. Polinsky. Ten days later—namely, on October 30, a police-sergeant saw the appellant in Islington with Mr. Polinsky's bicycle. The appellant said that it belonged to him, that he had had it fourteen months, and that he had bought it at the Cattle Market for 4*l.* 10*s.* He was charged with the unlawful possession of the bicycle, and he said: "I did not steal the

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bicycle, but a chap I know stole it. I have had it about three weeks. He owed me some money and he gave me the bicycle." On the following day the appellant was charged at the police court with unlawful possession. He was remanded for a week in custody. On November 7 he was released on bail. Seven days later a charge of warehouse breaking was substituted for that of unlawful possession, and he was kept in custody.

At the trial evidence was given of the breaking into the warehouse and of the larceny from the warehouse and of the finding of the appellant in possession of the bicycle, and of his contradictory statements about that possession.

A Mrs. Smith, who had given evidence at the police court, was called as a witness for the prosecution, and said that she and her husband carried on the business of general dealers in Holloway. She said that she had known the appellant for ten years, and that he brought Mr. Fennimore's charger and accumulator to their house and asked if her husband would dispose of them for him. She said that she told him that she would ask her husband when he came from hospital. That conversation she said took place in November, though she could not give the exact date. She added that on November 13, when the appellant was on bail, he sent for her and, to quote her words, "wanted me to say he was not the young fellow who called with the stuff." That invitation she said she declined, saying that she had already made her statement, and indeed it was on the following day that she gave her evidence at the police court. Thereupon, Mrs. Smith was cross-examined by the counsel who then appeared for the appellant, and it was suggested to Mrs. Smith that her story was a pure invention, fabricated because she had, or thought she had, a grievance against the appellant about her own brother. The suggestion was that her brother, who was serving a sentence of three years' penal servitude for coining and five years' preventive detention to follow, and had been convicted with the prisoner in the dock of house-breaking and sentenced to five years' penal servitude,

had, as she believed, been given away by the prisoner, and that therefore she had invented this story against the prisoner. She denied that she had any grudge against the appellant, and she said: "He suffered his punishment the same as my brother did."

Later, the appellant himself went into the witness box, and he said that Mrs. Smith's evidence was not true, that he had never taken the things to her house, that her story was due to malice because she thought he had given her brother away when he was convicted of house-breaking seven years previously. With regard to the bicycle, the appellant said that Mrs. Smith's husband had given it to him about October 24, because he owed him some money, and he said he did not tell the detective of that fact because he wanted to keep Mr. Smith out of the court. He also denied the statement of Mrs. Smith, that he paid her a visit while he was out on bail.

In view of those questions which had been put to Mrs. Smith, and those statements which had been made by the appellant about her in his evidence, he was allowed to be cross-examined as to character. Being cross-examined the appellant admitted that he had been bound over in 1915 and 1917 for larceny, that he had suffered eighteen months' imprisonment with hard labour, and then, in January, 1920, had been convicted again, and had been sentenced to three months in 1922 for loitering. He called two witnesses and sought to set up an alibi. In the result, the count for receiving was left to the jury, and the jury convicted the appellant.

R. E. Seaton for the appellant. The appellant ought not to have been cross-examined as to his character, inasmuch as there had been no attack on the character of Mrs. Smith, who was a witness for the prosecution, within the meaning of s. 1 (*f*) (ii.) of the Criminal Evidence Act, 1898. The word "character" is used several times in that section, and throughout the section "character" means the general reputation of a person. An imputation on the character of a witness for the prosecution means an attack on the general

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reputation of the witness—namely, that he is a person of bad character. In this case there was no attack on Mrs. Smith's general reputation, it was only suggested that her story was not true, and a reason was further suggested. It was held in *Rex* v. *Rouse* (1) that for a prisoner to say of a statement made by the prosecutor "it is a lie and he is a liar" amounted to no more than an emphatic denial of the truth of the charge made against him and was not such an imputation on the character of the prosecutor as to render the prisoner liable to be cross-examined as to his previous character. In order that a question may be construed into an attack on the prosecutor's general character there must be an imputation of misconduct independently of the defence, or of the necessity for developing the defence: *Rex* v. *Bridgwater*. (2) In order to render a prisoner liable to cross-examination as to his character there must have been an attack on the conduct of the prosecutor or of a witness for the prosecution outside the evidence given by him: *Rex* v. *Preston*. (3) A suggestion that a witness is committing perjury is an attack upon the evidence of that witness and not upon his general character. The suggestion made in this case with regard to Mrs. Smith's evidence was part and parcel of the defence. The character of Mrs. Smith was put in issue by counsel for the prosecution in re-examination and not in cross-examination.

G. L. Bannerman for the Crown. In this case the nature and conduct of the defence was such as to involve imputations on the character of a witness for the prosecution, and therefore the cross-examination of the appellant with regard to his character was admissible. The suggestion was made to Mrs. Smith that she had deliberately concocted her story out of revenge and that it was untrue, that was an imputation upon her general character. A distinction is drawn in s. 1 of the Criminal Evidence Act, 1898, between the general character of a prisoner and the character of a witness for the prosecution. An imputation on the character of a witness for

(1) [1904] 1 K. B. 184. (2) [1905] 1 K. B. 131.
(3) [1909] 1 K. B. 568.

the prosecution within the meaning of that section must not be limited to an imputation on the general reputation of the witness.

[LORD HEWART C.J. It was held in *Reg.* v. *Rowton* (1) that evidence as to a man's character must be confined to evidence of the man's general reputation.]

When one looks at s. 1 of the Act of 1898 it is clear that "character" as there used does not always mean general reputation. In *Reg.* v. *Marshall* (2) Darling J. ruled at the Central Criminal Court, in a case where the prisoner giving evidence alleged that a witness for the prosecution had committed the offence, that the prisoner could be cross-examined as to previous convictions, even though the statement made by the prisoner related to facts material to the actual charge and was made as a necessary part of the defence, and not for the purpose of casting imputations. That decision was approved by the Court of Criminal Appeal in *Rex* v. *Hudson*. (3) In *Rex* v. *Wright* (4) it was held that a suggestion by a prisoner that admissions made by him when in custody were obtained from him by the bribes or threats of a police officer, who was a witness, was an imputation made upon the police officer and rendered the cross-examination of the prisoner as to his previous character admissible. It was also held in *Rex* v. *Jones* (5) that a suggestion that a witness had fabricated evidence and obtained successive remands for that purpose was an imputation upon the character of a witness for the prosecution. In *Rex* v. *Roberts* (6) it was held that a suggestion that evidence was given by a witness from a desire for revenge was an imputation upon the character of the witness within s. 1 (*f*) (ii.) of the Criminal Evidence Act, 1898.

[He was stopped.]

Seaton in reply. *Rex* v. *Wright* (4); *Rex* v. *Roberts alias Spalding* (6); and *Rex* v. *Jones* (5) can be distinguished,

(1) (1865) L. & C. 520; 34 L. J. (M. C.) 57.
(2) (1899) 63 J. P. 36.
(3) [1912] 2 K. B. 464.
(4) (1910) 5 Cr. App. R. 131.
(5) (1923) 17 Cr. App. R. 117.
(6) (1920) 15 Cr. App. R. 65.

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because in neither of those cases was it an essential part of the defence to make the various imputations, whereas in the present case the allegation that the story told by Mrs. Smith was untrue and that the evidence was given from motives of revenge was an essential part of the defence.

The judgment of the Court (LORD HEWART C.J., GREER and ACTON JJ.) was delivered by

LORD HEWART C.J. who, after stating the facts set out above, continued: In those circumstances the appellant comes to this Court to say, so far as the conviction is concerned, that the cross-examination of him about his antecedents ought not to have been permitted, inasmuch as nothing had been done to bring his case within the statute which in certain circumstances permits such cross-examination. Apparently, the ground upon which it was said that the cross-examination was permissible was that he had chosen to put his character in issue. Perhaps it would have been more accurate to say that the ground upon which the cross-examination was permitted was that the nature, or at any rate the conduct, of the defence had been such as to involve imputations on the character of a witness for the prosecution. The question is whether that contention is right.

It may be convenient to read once more the important words of the Criminal Evidence Act, 1898. By s. 1 of that Act it is provided that "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person"; and then follows a long proviso, para. (*f*) of which is as follows: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . . (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution

with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." It is apparent that within the space of a very few lines the word " character " is used in this part of the section no fewer than four times. It is also apparent that the imputations which are spoken of in the closing words of the passage I have read are described, not as imputations on the prosecutor or the witnesses for the prosecution, but as imputations on the character of the prosecutor or the witnesses for the prosecution. In those circumstances it is not difficult to suppose that a formidable argument might have been raised on the phrasing of this statute, that the character which is spoken of is the character which is so well known in the vocabulary of the criminal law—namely, the general reputation of the person referred to ; in other words, that " character " in that context and in every part of it, in the last part no less than in the first, in the third part no less than in the second, bears the meaning which the term " character " was held to bear, for example, in the case of *Reg.* v. *Rowton* (1), where the question was considered by the Court of Crown Cases Reserved, consisting of Cockburn C.J., Erle C.J., Pollock C.B., Williams J., Martin B., Willes J., Channell B., Blackburn, Byles, Keating, Mellor JJ., Pigott B., and Shee J. Nevertheless, when one looks at the long line of cases beginning very shortly after the passing of the Criminal Evidence Act, 1898, it does not appear that that argument has ever been so much as formulated. It was formulated yesterday. One can only say that it is now much too late in the day even to consider that argument, because that argument could not now prevail without the revision, and indeed to a great extent the overthrow, of a very long series of decisions. Our attention has been directed to the cases of *Rex* v. *Rouse* (2) ; *Rex* v. *Bridgwater* (3) ; *Rex* v. *Preston* (4) ; *Rex* v. *Hudson* (5) ;

(1) L. & C. 520 ; 34 L. J. (M. C.) 57.
(2) [1904] 1 K. B. 184.
(3) [1905] 1 K. B. 131.
(4) [1909] 1 K. B. 568.
(5) [1912] 2 K. B. 464.

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Rex v. *Wright* (1); *Rex* v. *Roberts* (2); *Rex* v. *Jones* (3), and an early case, which is not a decision of the Court of Criminal Appeal, but a decision of a single judge in the days when there was no Court of Criminal Appeal, and when there might have been but was not a case stated for the Court of Crown Cases Reserved: *Reg* v. *Marshall.* (4) When one looks at that long line of authority, whatever may be the merits of the more fundamental argument to which reference has been made, it is apparent that here the statement made by the prisoner and the suggestions made on his behalf in cross-examination to the effect that Mrs. Smith's evidence was not merely a pure invention, but was due to malice towards him arising out of a grievance imputed to Mrs. Smith about a previous and wholly unrelated episode in which the appellant and her brother were concerned, were imputations that went sufficiently far to permit the kind of cross-examination of which the appellant complains. It is not possible to lay down, even if it were desirable, as the authorities stand, a series of formulas or regulations upon this matter. At some future time, perhaps, upon a slightly different case, an opportunity may arise for further and better investigation of a really interesting and important point, and a point, it may be, upon which further investigation and a statement of a clear and universal ratio decidendi may be desirable. For the purposes of this appeal it is enough to say that, according to a considerable line of authority, that which is here complained of was within the limits of the law.

Apart from that legal question, it is abundantly clear that there are no merits in this appeal. The evidence was overwhelming, and indeed one cannot help thinking that counsel for the prosecution would be well advised, even where the occasion for such cross-examination appears to arise, to refrain from embarking upon it unless the circumstances are such as to make it appear to the mind of the learned counsel to be a positive duty that he should enter upon that somewhat invidious task.

(1) 5 Cr. App. R. 131.
(2) 15 Cr. App. R 65.
(3) 17 Cr. App. R. 117.
(4) 63 J. P. 36.

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With regard to the sentence, the appellant was sentenced to fifteen months' imprisonment with hard labour, in a bad case of receiving stolen property well knowing it to have been stolen. It is quite true that he is a very young man, but this is by no means his first offence. He had two chances given him. He was bound over on two occasions, and he has already, since then, served two sentences of imprisonment, one of them being a sentence of eighteen months' hard labour for housebreaking. In these circumstances this Court sees no reason to interfere either with the conviction or with the sentence, and the appeal is dismissed. Inasmuch, however, as leave to appeal was given, the sentence will run, not from this day, but from the date of conviction.

Appeal dismissed.

Solicitor for appellant: *J. Albert Davis.*
Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

[IN THE COURT OF APPEAL.]

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SOUTHERN RAILWAY COMPANY *v.* MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF GOSPORT AND OTHERS.

[1924. S. 4801.]

Bridge—Road crossing Railway—Repairs to Road—Damage to Bridge—Measure of Damages.

The plaintiffs brought an action against the defendant corporation to recover the cost of repairing a bridge which carried a public road across their railway and had been damaged by the corporation in repairing the road under a contract with the plaintiffs. They also claimed alternatively against the corporation and the owners of a steam roller as being jointly and severally liable under s. 7 of the Locomotive Act, 1861. The plaintiffs had repaired the bridge at the cost of 320*l.* The judge at the trial found that the corporation had been guilty of negligence causing the damage, but that the condition of the bridge was such that the repairs done to it by the plaintiffs would have been necessary in the next few months whether it had been damaged by the

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corporation or not. He therefore assessed the damages against the corporation at approximately six months' interest at 5 per cent. on a principal sum of 320*l.*, and gave judgment for the plaintiffs for 10*l.*:—

Held, that there was no evidence to support the inference that the repairs would have been necessary apart from the damage done by the corporation; that the reasonable inference to draw from the facts was that the bridge would have stood good for several years; that in the circumstances the plaintiffs had acted reasonably in repairing it, and that they were consequently entitled to recover the full cost of so doing.

Judgment of Greer J. [1926] 2 K. B. 89 varied.

APPEAL of the plaintiffs and cross-appeal by the defendant corporation from the judgment of Greer J. (1)

Schiller K.C. and *The Hon. S. O. Henn Collins* for the appellants.

Rayner Goddard K.C. and *Trapnell* for the respondents, the Gosport Corporation.

The Court (BANKES, ATKIN and SARGANT L.JJ.) gave no decision upon the construction or meaning of s. 7 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70). They held that the respondent corporation was liable for negligence at common law, and so far affirmed the judgment of the learned judge; but they varied the judgment to the extent and for the reasons stated in the headnote.

Appeal allowed and judgment varied.
Cross-appeal dismissed.

Solicitor for appellants: *W. Bishop.*

Solicitors for respondent corporation: *Kenneth Brown, Baker & Baker, for E. Bechervaise, Portsmouth.*

(1) [1926] 2 K. B. 89.

W. H. G.

[IN THE COURT OF APPEAL.]

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COMMISSIONERS OF INLAND REVENUE *v.* WRIGHT.

Revenue—Super Tax—Assessment—Shareholder in Company—Bonus Dividend out of Reserve Fund—Offer of new Shares fully paid up—Option to take Shares or Cash—Distribution of accumulated Profits—Capital or Income—Liability to Super Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D.*

A company having a sum consisting of accumulated profits standing to the credit of its reserve fund and being empowered so to do by its articles of association, passed (*a*) resolutions that its capital should be increased by the creation of new shares, and that it was desirable to capitalize the said sum and make it available for distribution among the shareholders as capital free from income tax; and (*b*) further resolutions pursuant to which the said sum was applied in payment up of the new shares which were to be offered to the shareholders in proportion to their existing shares with an option to them either to accept the new shares so fully paid up, or to take their nominal value in cash.

A shareholder having accepted the whole of the new shares offered to him as fully paid, was assessed to super tax in respect thereof. The Special Commissioners discharged the assessment, being of opinion, on the evidence and arguments adduced before them, that the case was governed by *Blott's* case and *Greenwood's* case [1921] 2 A. C. 171 :—

Held, by the Court of Appeal, (1.) that so far as the question raised was a matter of fact, it was concluded against the revenue by the finding of the Commissioners, and (2.) that so far as it was a matter of law, it was concluded against the revenue by the decisions in *Bouch* v. *Sproule* (1887) 12 App. Cas. 385; *Blott's* case and *Greenwood's* case [1921] 2 A. C. 171; and *Inland Revenue Commissioners* v. *Fisher's Executors* [1926] A. C. 395; the company being dominant for all purposes, and the shares in question not bearing the character of income.

Decision of Rowlatt J. [1926] 2 K. B. 246 reversed.

APPEAL from a decision of Rowlatt J. (1), in which he allowed an appeal from the Special Commissioners who had discharged an assessment made upon the present appellant, Mr. Tom Wright, for super tax, in the following circumstances :—

Previously to August, 1919, the appellant Wright was the holder of 1100 ordinary shares of 5*l.* each in the Pinxton Collieries, Ld. (hereinafter called "the company"). By the

(1) [1926] 2 K. B. 246.

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special resolution of August 27, 1919, hereinafter mentioned, those shares were divided into 5500 ordinary shares of 1*l.* each. In exercise of the option given to him by the circular letter of the company of August 28, 1919, set out below, the appellant accepted, and there were subsequently allotted to him as capital, 5500 new ordinary shares thereby offered to him, which were to be paid for with the bonus dividend to which he was entitled and which had been declared out of the reserve fund.

In making his return for super tax for the year ending April 5, 1921, the appellant did not include the value of the 5500 new ordinary shares, allotted to him in pursuance of the exercise of his option, and an additional assessment was accordingly made upon him in respect thereof—that is to say, in the sum of 5500*l.*, plus 536*l.* income tax thereon, making in all 6036*l.*

Wright appealed to the Special Commissioners, who discharged the assessment as above mentioned.

The following were the material facts relating to the company and the issue of the new shares in question :—

Previously to August, 1919, the capital of the company was 180,000*l.*, divided into 18,000 ordinary shares of 5*l.* each and 18,000 preference shares of 5*l.* each. The company made up its accounts to September 30 in each year, and the profits were assessed to income tax. At September 30, 1918, the company's balance sheet showed a reserve fund of 125,000*l.* and a balance standing to the credit of profit and loss of upwards of 44,500*l.* after payment of dividends. The 125,000*l.* represented accumulated profits of the company's trade, and had been built up by the setting aside from time to time by the directors under the powers in the articles of association of portions of the company's profits.

Art. 127 of the company's articles of association related to a reserve fund, and provided that " The directors may, before recommending any dividend, set aside out of the profits of the business such sum as they think proper as a reserve fund, to meet contingencies, or for equalising dividends, or for repairing or maintaining any buildings, plant, machinery,

or works connected with the business of the company, or for redeeming debentures, or to cover the loss in wear and tear, or other depreciation or diminution in value of any property of the company, or for making provision for exceptional losses, expenses or contingencies, or for the extension or development of the company's business, or for any other purpose to which the profits of the company may be properly applied; and (pending such application) the directors may invest the sum so set apart as a reserve fund upon such securities (other than shares of the company) as they think fit, or may employ the assets constituting the reserve fund in the business of the company, without being bound to keep the same separate from the other assets."

In August, 1919, a circular letter was addressed by the directors to the shareholders containing proposals for increasing the company's capital by the creation of additional shares to be offered to the shareholders by way of bonus, and for the adoption of new articles of association to enable the issue of the bonus shares to be made, and giving notice of a general meeting for effecting these purposes. The letter contained the following passage: "In view of the sum standing to the credit of the reserve fund, there is no necessity for the members entitled to the new shares to actually provide cash for such shares out of their own moneys. The issue of the new shares can be readily effected by this company declaring that 90,000*l.* shall be taken out of the accumulated reserve fund and divided by way of bonus dividend among the ordinary shareholders. Instead of such bonus being paid by the company in cash, shareholders entitled may let it be applied in satisfying the sums payable in respect of the new ordinary shares proposed to be issued. Any new shares not so taken by shareholders would be disposed of by the directors. As soon as possible it is intended to convene a general meeting of members to authorize the distribution of a bonus dividend equal to 1*l.* in the pound for every 1*l.* of ordinary share capital held, and the offering to the holders of such capital at par of fully paid ordinary shares equal in nominal amount to the total bonus payable."

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On August 27, 1919, an extraordinary general meeting of the company was held, at which the proposals contained in that letter were carried out as follows: (*a*) A special resolution was confirmed that each of the existing 5*l.* ordinary and preference shares should be divided into five fully paid up ordinary and preference shares of 1*l.* each respectively; and that the new articles of association should be approved and thereby adopted as the articles of association of the company; (*b*) resolutions were passed: (1.) that the capital of the company be increased from 180,000*l.* to 300,000*l.* by the creation of 110,000 ordinary shares of 1*l.* each ranking for dividend and in all other respects pari passu with the existing ordinary shares, and 10,000 6 per cent. cumulative preference shares of 1*l.* each ranking pari passu with and having the same priorities and subject to the same restrictions and limitations as the existing cumulative preference shares, and (2.) that the directors be authorized to do what was necessary in connection therewith; (*c*) resolutions were passed (i.) that it was desirable to capitalize the sum of 90,000*l.*, part of the undivided profits, standing to the credit of the reserve fund, and that the directors be authorized to withdraw that sum from the reserve fund, so that it might be available for distribution among the shareholders as capital free of income tax; (ii.) that the directors be authorized to apply that 90,000*l.* in payment up of 90,000 new ordinary shares in the company of 1*l.* each credited as fully paid, which new shares should in the first instance be offered at par to all the holders of ordinary shares in proportion to the number of shares held by them respectively on the day preceding the meeting, that was to say, that each holder of ordinary shares might take one new ordinary share of 1*l.* credited as fully paid up for every one ordinary share of 1*l.* fully paid held by him; (iii.) that if any shares offered to a member should be declined or not accepted within fourteen days from the service of notice specifying the number of shares to which such member was entitled, the member should be entitled to receive cash for the full nominal amount of the new

shares so declined or not accepted by him, and the shares so declined or not accepted might be disposed of as the directors thought fit.

Pursuant to these resolutions a circular letter dated August 28, 1919, was sent by the directors to each of the shareholders, which was as follows :—

"Pinxton Collieries, Ld.

Issue of 90,000*l.* new capital.

Dear Sir (or Madam),

OFFER.—In pursuance of the extraordinary resolutions of the company passed on the 27th day of August, 1919, for the creation and offer to the holders of ordinary shares of the company of 90,000 new ordinary shares of 1*l.* each to rank pari passu with the existing 90,000 ordinary shares of the company, the directors now offer to you of such new ordinary shares of 1*l.* each (fully paid) as capital . . . . *l.* the full nominal amount of such shares, is equal to the capitalized portion of the reserve fund to which you are entitled in pursuance of the above mentioned resolutions.

OPTION.—You and/or your nominees or nominee may accept the new ordinary shares hereby offered to you in whole or part. If this offer is not so accepted before the 12th day of September, 1919, it will be deemed to be declined ; and any shares which shall not be accepted or which shall be so deemed to be declined will be disposed of by the directors in such manner as they think most beneficial to the company, and you will be paid cash for the full nominal amount of the shares not accepted by you or your nominees.

ACCEPTANCE.—If you yourself accept the new ordinary shares in whole or part, a letter of acceptance in the form of that now enclosed and coloured pink should be filled up and signed by you. If it be desired that all or any of the new ordinary shares hereby offered to you shall be issued to a person or persons nominated by you, a nomination and acceptance in the form of that now enclosed and coloured yellow should be filled up and signed by you or your nominee or nominees. In either of the foregoing cases the letter of

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acceptance should be sent to the company at its registered address . . . . on or before the 11th day of September, 1919.

REFUSAL.—If you or your nominees decline to accept all or any of the new ordinary shares hereby offered to you, it will facilitate business if you will fill up, sign, and send to me before the 12th day of September, 1919, the form of renunciation now enclosed and coloured blue. On receipt of such notice of refusal cheque for the above mentioned amount of the bonus payable to you will be sent in exchange.

By order of the Board of Directors,

(Sgd.) A. MILLHOUSE, Secretary."

The appellant, as the holder of 5500 ordinary shares of 1*l.* each, received a copy of the last mentioned letter offering him a like number of new shares, and in the exercise of the option given to him by the letter he accepted 5500 new ordinary shares thereby offered to him, and 5500 new fully paid ordinary shares were thereupon allotted to him as capital.

Of the total 90,000 new ordinary shares offered by the company, 81,625 were accepted by and allotted to the shareholders, and the balance of 8375 shares had not been issued.

The total amount of cash received by shareholders in respect of new ordinary shares not accepted by them was 8375*l.*

The balance sheet of the company as at September 30, 1919, showed that the reserve account had been reduced by 90,000*l.*, which had been applied as to 81,625*l.* thereof to the issue of shares in pursuance of the extraordinary resolution aforesaid, and as to 8375*l.* thereof in payment of cash in pursuance of the said resolutions. The balance sheet also showed that the nominal capital had been increased in accordance with the said resolution, and the paid up capital on the ordinary shares was shown as 171,625*l.*, an increase of 81,625*l.*, representing the amount of the ordinary shares actually accepted by the shareholders.

There was no official Stock Exchange quotation for the shares of the company. In the two years preceding October, 1919,

no sales of shares took place. In October, 1919, some shares were sold, and realized 24*s.* 6*d.* per share.

Upon Wright's appeal to the Commissioners it was contended on behalf of the Crown that the option to take cash instead of the shares differentiated this case from *Inland Revenue Commissioners* v. *Blott* (1) and *Inland Revenue Commissioners* v. *Greenwood* (1), but the Commissioners, who had to find the facts, said that "having considered the evidence and the arguments adduced before us, we are of opinion that the case is governed by the cases of *Blott* (1) and *Greenwood*" (1), and they discharged the assessment.

Upon the appeal to Rowlatt J. (2), he distinguished *Blott's* case (1) and *Bouch* v. *Sproule* (3), and held that the new shares in question were income and not capital of the shareholder, and that Wright was liable to super tax in respect of them.

Wright appealed against that decision.

There was no appeal by another shareholder, Brigadier-General D'Ewes Coke, who had taken partly new shares and partly cash in respect of his original holding, from Rowlatt J.'s decision (2), so far as it included and affected his assessment.

The appeal was heard on July 1 and 2, 1926.

Latter K.C. and *Cyril King* for the appellant.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the respondents.

[Counsel in effect repeated the arguments respectively urged by them in the Court below, and referred to the decision of the House of Lords in *Inland Revenue Commissioners* v. *Fisher's Executors* (4), given four days after Rowlatt J.'s judgment in this case. (2)]

LORD HANWORTH M.R. This is an appeal from a decision of Rowlatt J., given on February 22, 1926, whereby he set aside the decision of the Commissioners, who had discharged an additional assessment upon the appellant in this case to super tax in the sum of 6036*l.* for the year ending April 5,

(1) [1921] 2 A. C. 171.
(2) [1926] 2 K. B. 246.
(3) 12 App. Cas. 385.
(4) [1926] A. C. 395.

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1921. [His Lordship then stated the facts above set out and also art. 127 of the company's articles of association and continued :] Art. 127 is the same, except that it is fuller in its terms, as that which appears in *Bouch* v. *Sproule* (1), and which was considered by Kay J., who there pointed out that that article enables the directors to capitalize the reserve fund and to apply a portion of the net earnings to necessary works, and to "issue new shares to represent the moneys so applied, the dividend being declared out of the remaining portion of the earnings of the company. I must, therefore, treat this as an authority that under such a provision the company would be empowered to deal with this reserved fund as a capital fund if they thought fit."

The appellant was the holder of 5500 ordinary shares and he received a copy of the letters to which I have referred and a copy of the offer containing the option and the opportunity of acceptance, and providing for the event of refusal. As a matter of fact he accepted 5500 new ordinary shares thereby offered to him. No question, therefore, in this case arises as to what would happen if he had accepted a part only and refused a part. He accepted the offer of the 5500 ordinary fully paid shares as capital. Now it appears that at that time the shares were of value. We have not the precise value in the market of these 1*l.* shares on August 29, 1919, but we have the fact that in October, some five or six weeks afterwards, some of these shares were sold and realized not 1*l.* only, but 24*s.* 6*d.* per share. There is evidence, therefore, that at the time when this offer was made the inclination of all shareholders would be to accept the shares offered to them fully paid, as capital, rather than to refuse and have a cheque sent for the face value of the shares ; for it would appear that if they refused the shares and received a cheque, the cheque would be for a sum smaller than that which would be obtained if they sold the shares and realized their price in the market.

What is the substance of these proceedings ? For we have to examine what is the substance of the matter. This is

(1) (1884) 29 Ch. D. 635, 643.

clearly stated by Lord Herschell when *Bouch* v. *Sproule* (1) reached the House of Lords. He there said: "I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid up capital upon newly created shares." In *Bouch* v. *Sproule* (1) there was an option to refuse, but an option which was less advantageous to the shareholder than acceptance would be, just as in the present case the money value of the shares made it unlikely that a shareholder would reject the offer to accept the shares as capital. However, Lord Herschell plainly puts it that the matter must be looked at as a whole, and that the substance of it must be regarded. I may add that in doing so he is following the constant practice in all tax cases where the mere form by which a proceeding is carried out is not conclusive as to its nature.

The argument before the Commissioners was this: It was contended on behalf of the Crown that upon the facts proved in this case it was distinguishable from *Blott's* case (2) and *Greenwood's* case (2), in that in the present case the shareholders were given a real option to receive cash. That was the contention. The Commissioners, who have to find the facts, say this, "that having considered the evidence and the arguments adduced before us, we are of opinion that the case is governed by the cases of *Blott* and *Greenwood*." (2) It appears to me that that conclusion of the Commissioners goes at least to this extent, that if it is a question of fact, if they have to estimate what is in fact the substance of the matter, they upon the evidence before them reject the suggestion made that the option given was one which differentiated the present from *Blott's* case (2) and *Greenwood's* case (2), and they hold that the substance of the matter was that what was distributed to the shareholders, whether there was an option or whether there was not, was a distribution of capital; and I think it is important to bear that in mind when one comes to consider what is the law applicable

(1) 12 App. Cas. 385, 399. (2) [1921] 2 A. C. 171.

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to the case. In *Blott's* case (1) and *Greenwood's* case (1), when before the Court of Appeal, Scrutton L.J. pointed out that this operation of giving shares as capital and the acceptance of these shares by the shareholders can only be done through the machinery appropriate to a company and with due regard to the relations between the shareholders and the company. He says: "It is to be noted that the company cannot issue fully paid up shares by simply capitalizing the reserve fund and applying it to the payment of the shares. For the reserve fund is the company's, and fully paid up shares must be paid for by some one other than the company. As a matter of machinery therefore a bonus or dividend payable to the shareholder must be declared and then appropriated to the payment up of the bonus shares, so that the shareholder pays for his shares by his bonus or dividend." When the case came before the House of Lords, it is recognized that although that is the necessary method and the method which must be deemed to have been followed, the result is that the company have distributed shares as capital to their shareholders; and Lord Haldane makes it abundantly plain that the point to look at is what is the intention of the company, expressed and to be found in the terms of the resolution adopted by the corporators, the shareholders, at their extraordinary general meeting. He says (2): "But if, acting within its powers, it disposes of these profits by converting them into capital instead of paying them over to the shareholders, that, as I conceive it, is conclusive as against all the outside world." More than that, he says (3): "For the reasons I have given I think that it is, as matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to

(1) [1920] 2 K. B. 657, 673. (2) [1921] 2 A. C. 171, 182.
(3) [1921] 2 A. C. 184.

take up unissued shares would otherwise have to contribute. If this is done the money so applied is capital and never becomes profits in the hands of the shareholder at all." Finally (1), he says that " both on principle and on authority, the transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes." Lord Finlay in his speech makes observations to the same effect.

The result of that case, which of course is binding upon us, must be applied to the present case. It is said that a distinction can be found, and that inasmuch as in the present case there was an option and a clear alternative offered to the shareholders that a cheque should be sent if they did not take shares, the matter is excluded from the principle of *Blott's* case (2), but, as I have pointed out, it is clear from *Bouch* v. *Sproule* (3), the principle of which was adopted by and applied to *Blott's* case (2), that there was an option which is not disregarded, but is indeed referred to in terms by Lord Herschell. He says (4): " It is pointed out that the shareholder might nevertheless be entitled to receive his dividend from the company. I agree that this is so," but taking all the facts and that fact into account, he comes to the conclusion that in substance the operation is a distribution of capital.

It may be that in some cases the option may be held to be merely illusive; that the form may be adopted in order to try and pretend that the principles of *Bouch* v. *Sproule* (3) and *Blott's* case (2) have been carried into effect; but I may point out that if that were so, the substance of the matter would be otherwise than it was held to be in *Bouch* v. *Sproule* (3) and in *Blott's* case. (2) In *Burrell's* case (5), when we were dealing with a different case, but incidentally considering the effect of *Blott's* case (2), Atkin L.J., referring to *Blott's* case (2), says: " There the intention of the company is

(1) [1921] 2 A. C. 188.
(2) Ibid. 171.
(3) 12 App. Cas. 385.
(4) Ibid. 398.
(5) [1924] 2 K. B. 52, 68.

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dominant for all purposes. Did the company intend to distribute as profits or as capital?" It is true that in *Inland Revenue Commissioners* v. *Fisher's Executors* (1) I called attention to the fact that there no option was left to the shareholder, but I also called attention to the fact that as in *Blott's* case (2)—just as here—the company had the dominant voice in what it gave, and in what form it gave, the undivided profits to the shareholder. It is quite clear, therefore, from what I said, that I did not intend to disregard the full effect of the decision in *Blott's* case. (2)

Finally, we have the more recent decision of the House of Lords in *Fisher's* case (3), a decision which was given four days after Rowlatt J. gave his decision now before us on this appeal. The present Lord Chancellor, after examining *Blott* and *Greenwood's* case (2) and *Bouch* v. *Sproule* (4), deals with the matter, and clearly points out that the principle is that which was enunciated by Lord Haldane in the passage to which I have referred, that the company had the power to determine conclusively against the whole world whether it will withhold the profits it has accumulated from distribution to its shareholders as income, or will apply them in payment of capital sums, and he repeats, quoting from *Blott's* case (2): "The company was, therefore, master of the situation." Lord Shaw does the same, and in his speech alludes to the danger of this system of finance. He points out (5) that: "It would be possible, by the exercise of dexterity on the part of company directors and acquiescence on the part of shareholders, to add to each individual shareholder's capital interest in the company, so that in course of time such shareholder would find himself increasingly wealthy, the increments to his assets arising out of annual profit, and yet would be able to escape from the payment of that super tax which he would have contributed to the revenues of the nation had the distribution of the profits

(1) [1925] 1 K. B. 451, 463.
(2) [1921] 2 A. C. 171.
(3) [1926] A. C. 395.
(4) 12 App. Cas. 385.
(5) [1926] A. C. 405.

been made by the company in cash." Those words may well be weighed by those who have to consider whether in these cases some alteration of company law is desirable; but they do not in any way indicate anything like a divergence from the principle which was enunciated in *Blott's* case. (1) Indeed, Lord Shaw says (2): "It is incorrect in principle to attempt to get behind that transaction, legal and competent and regular in form, and to endeavour to construct a canon of liability to income tax out of conjecture as to the motive or scheme for the defeat of the revenue which underlay its various stages."

With those principles clearly enunciated, it appears to me that this Court must hold upon the facts that this distribution which fell to the shareholders was a distribution of capital and not of income. It appears to me that if in such cases it is a matter of degree, a matter of the particular method adopted by the company, a matter of deciding whether the option is a good one or not, that matter, so far as it is a question of fact, has been concluded against the revenue by the Commissioners. But if we are to treat it as a matter of law, then it seems to me that inasmuch as there was an option in *Bouch* v. *Sproule* (3), inasmuch as there was the same article in *Bouch* v. *Sproule* (3), for effective purposes, as in the present case, we cannot hold that the mere existence of an option prevents the process adopted from being one of the distribution of capital. The dominance of the company, the resolutions passed by the shareholders at their general meeting, the notices issued by the company, all point in the same direction as *Bouch* v. *Sproule* (3), the principle of which, as Lord Sumner points out in *Fisher's* case (4), has now become embedded in the authorities relating to the collection of taxation. I cannot therefore distinguish the present case from *Bouch* v. *Sproule* (3) and *Fisher's* case (4) by reason of there being an option.

For these reasons it appears to me that the appeal must be allowed with costs, that the assessment must be discharged

(1) [1921] 2 A. C. 171.
(2) [1926] A. C. 407.
(3) 12 App. Cas. 385.
(4) [1926] A. C. 395.

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and the Commissioners' decision discharging the assessment restored.

SCRUTTON L.J. We have listened in this case to an argument by counsel marked by an obvious and fervid conviction that the contentions put forward were right and by an apparent readiness to die at the stake for their convictions. I can only say, as I have said during the case, that I think the argument is addressed to the wrong Court. It is quite true that technically you must come to the Court of Appeal before you can get to the House of Lords, but in my view this Court is bound by the three decisions in the House of Lords to which reference has been made—namely, *Bouch* v. *Sproule* (1); *Blott's* case (2); and *Fisher's* case (3); and if it is desired to argue that there is some distinction which is not obvious to the inferior Courts, which those who sit in the House of Lords when this appeal comes on will find themselves able to draw, that argument should be addressed to the House of Lords and not to this Court.

I desire to say that now I am only dealing with a case where the transaction has gone through as the company expected it to go through; that is to say, a case where the shareholder has, as he was expected to do, taken these shares. It is quite true that there is another case (*Inland Revenue Commissioners* v. *Coke* (4)) in which there is not an appeal, where the shareholder, to everybody's surprise and to his own considerable pecuniary loss, took the cash; there is no appeal in that case and it is not before this Court; and although, incidentally, I may say something about it, I am dealing with a case where the shareholder took the bonus shares. I have already stated my views of this matter at some considerable length in my judgments in *Blott's* case (5) and in *Fisher's* case (6), and I do not propose to repeat them. I remain of the opinion, which I gather is not the same as that of some of the members of the House of Lords, that the line of argument in *Swan Brewery Co.* v. *The King* (7) was not

(1) 12 App. Cas. 385.
(2) [1921] 2 A. C. 171.
(3) [1926] A. C. 395.
(4) [1926] 2 K. B. 246.
(5) [1920] 2 K. B. 657.
(6) [1925] 1 K. B. 451.
(7) [1914] A. C. 231.

consistent with the line of argument in *Bouch* v. *Sproule* (1), but the House of Lords in *Blott's* case (2) found reasons for saying that the two did not interfere with each other, and of course I need not express any further opinion upon the subject. But I should like to say this, that I think a good deal of unnecessary argument has been brought into this case through not looking at it from the right point of view and through approaching it from what seems to me a very superficial view—namely, that the appellant has acquired some bonus shares and he could have sold them for so much, therefore he must have made some profit, and, of course, he must pay. The transaction really was this: There was a very prosperous company with 90,000 shares, which would be entitled to such proportions of the undivided profits as the directors thought fit to distribute. What the directors proposed to do was to cut each of those shares into two, turn them into two half shares, calling each half share a share. Exactly the same amount of undivided profits would be divided between the 180,000 half shares, called shares, as was to be divided between the 90,000 whole shares. There would be this effect, that the previous whole share would suddenly find itself of only half the value, because if you are going to distribute profit among 180,000 half shares called shares, the previous whole share will only get half of what it previously got, and as has appeared in each of the cases where the figures have been given, and as I have no doubt appeared in this case, the previous share only finds its value halved. When in *Bouch* v. *Sproule* (1) a bonus share of 7*l.* 10*s.* was issued, the value of the original share immediately dropped to the same extent. When in the case before Neville J. one bonus share was issued for each share previously held, the price of the original share immediately dropped half, and so when you say you have got a bonus share or you have got the cash, and do not add: "But, my dear friend, kindly remember the share I previously had is worth exactly half of what it previously was worth," the fallacy of talking about this as a profit

(1) 12 App. Cas. 385. (2) [1921] 2 A. C. 171.

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of a bonus share or the amount used to pay up the bonus share seems to me to become obvious, and I cannot help thinking that matters would have been simpler if a broader view had been taken of what this transaction in fact is, when you look at it all round. One looks at it again from the point of view of the actual figures in this case. Before this bonus share transaction was carried out the company on its balance sheet had, with its depreciation reserve, its profit and loss and its reserve account, a nominal amount of undistributed profit of 189,000*l.*; but it had not got them so that it could divide them, because when one looks at the other side, it had cash in the bank and War Stock amounting to 94,000*l.* only. It had not anywhere the 189,000*l.* that it could divide, and the reason why it did not have that sum was that it had been spent in improving the assets, or in expenditure supposed to be improving the assets; and one knows it is all very well to say you have a reserve fund, but you may find that reserve fund is worth nothing, because your assets are worth nothing; you cannot sell them. The undivided profits had been put into a position by the working of the company in which about 100,000*l.* was locked up, so that it could not be dealt with. When you look at the next balance sheet after this transaction has taken place you find that the situation has been changed in this way: Depreciation, reserve account, profit and loss and reserve account, now stand at 100,000*l.*, and as against that there is in bonds or cash, 120,000*l.* What has happened in effect is that the amount of the reserve fund which was locked up in the capital assets and could not be got at, has been treated as what it was, as capital, but as the company to increase the capital must increase its shares, the previous shares have been treated as two for one, and you have got the increased amount of capital that is necessary to make that change in the undivided profits: as you cannot issue paid up shares without the shareholders paying for them, it has been done by the machinery of purporting to pay a dividend to the shareholder, who promptly pays it back to pay up the capital share. That seems to me the real

transaction, and that it is much better to look at the effect of this transaction by considering it as a whole.

Now, as I understand, the distinction that is suggested between this case and the other cases is that here there was an option to take cash instead of shares; so there was in *Bouch* v. *Sproule*. (1) Lord Herschell expressly says that the shareholder could have taken cash if he had liked, but, as he says, it was not likely he would, because he got three times as much by taking the share as he did by taking cash. But that does not prevent there being a legal option, and the fact that it is commercially better to carry out one limb of the option rather than the other, seems to me to have no effect upon the position that there is a legal option. It seems to me just the same in this case. This was such a prosperous company that no holders had sold their shares in it for years before; they were waiting expectantly for what would come, but the shares before this transaction were worth double as much as they were after the transaction, for the conclusive reason that before the transaction they were entitled to twice as much profits as they were after the transaction. There being in *Bouch* v. *Sproule* (1) that real option, I cannot see how the fact that there is an option here, which, as it appears, some people thought it was more profitable to exercise by taking cash, makes any difference. I think that the principle laid down in *Bouch* v. *Sproule* (1), and accepted by the Court in *Blott's* case (2), governs this case, and that it is conclusive here that this company, as expressed in its resolutions, intended to capitalize 90,000*l.* for distribution amongst the shareholders as capital free of income tax. That being the intention of the company, and that, according to the principle stated in *Bouch* v. *Sproule* (1), being a matter which is determined by the company whether the shares are capital or income, it appears to me that whatever we might have said if we had not been bound by the decisions of the House of Lords, whether or not we might have accepted Lord Sumner's analysis in *Swan Brewery Co.* v. *The King* (3), we

(1) 12 App. Cas. 385, 397. (2) [1921] 2 A. C. 171.
(3) [1914] A. C. 231.

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are bound to carry out the view which I think has been laid down by the three decisions of the House of Lords, and to hold that in this case the fact that there was a legal option makes no difference; that the intention of the company prevails, and that therefore these bonus shares coming to this gentleman are not assessable as income, but are capital.

That I think concludes all I wish to say in addition to what I have already said in the two judgments to which I have referred.

RUSSELL J. I am of the same opinion. The question for the decision of the Court is, whether Mr. Wright was properly assessed to super tax in respect of the value of his 5500 shares. In my opinion the decision of the House of Lords in *Blott's* case (1) compels me to answer, "No, he was not."

Blott's case (1) has recently been considered in the House of Lords in *Fisher's* case (2), and in the course of his judgment delivered in *Fisher's* case (2) Lord Sumner, who certainly entertained no great affection for the decision in *Blott's* case (1), stated in clear terms what in his view the principle of that decision was. He states it thus (3): "Shortly stated, I understand that *Blott's* case (1) was decided on this principle. To attract super tax to a bonus distributed to him by a company in which he is a shareholder, what reaches the taxpayer must at that moment bear the character of income, impressed upon it by the company which distributes it and by it alone. Provided that the company violates no statute and also keeps within its articles, it can call the subject-matter of the distribution what it likes, and, I think, this involves the corollary, that it can either call it by a new name or simply discard its old one. After all, it is natural for the creature to be named by its creator. Further, what the company says it is, that it is as against all the world. What the company says it shall no longer be, that it is no longer for any purpose. How this is effected and by what resolutions, confirmations,

(1) [1921] 2 A. C. 171. (2) [1926] A. C. 395.
(3) [1926] A. C. 407, 408.

and instruments, does not matter, for such things are 'bare machinery.' In what the company has said and done is found the answer to the question: What has the subject-matter of the distribution now become or ceased to be, when first it reaches the taxpayer?"

Applying that principle to the present case, and looking only to what has happened in regard to Mr. Wright, I find the following events: first, capitalization by the company of 5500*l.*, part of the accumulated profits; secondly, application by the company of that sum in paying up the liability on the shares issued to Mr. Wright; thirdly, the receipt by Mr. Wright of those shares and nothing else; and, fourthly, retention by the company of 5500*l.* under such conditions that it could no longer be distributed in the way of profits. In those circumstances, I feel compelled by the decision in *Blott's* case (1) to hold that what in fact reached the hands of Mr. Wright did not bear the character of income, and that, accordingly, super tax was not attracted.

For these reasons, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the appellant: *Johnson, Weatherall, Sturt & Hardy, for Parker, Rhodes & Co., Rotherham.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1921] 2 A. C. 171.

R. M.

Explained. CHANDRIS *v.* ISBRANDTSEN-MOLLER CO. INC. [1950] 1 All E.R. 768.

Explained. CHANDRIS *v.* ISBRANDTSEN-MOLLER INC. [1951] 1 K. B. 240

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June 29, 30
July 1, 22.

[IN THE COURT OF APPEAL.]

AKTIESELSKABET REIDAR *v.* ARCOS, LIMITED.

[1924. A. 2321.]

Shipping—Charterparty—"Full and complete cargo"—Demurrage—Summer Cargo—Winter Cargo—Dead Freight.

A charterparty provided that the chartered vessel should proceed to a named port on the White Sea and there load a full and complete cargo of 850 standards of sawn timber and proceed therewith to an English port and there deliver the cargo on being paid freight at a fixed sum per standard. The vessel was to be loaded at the rate of so many standards per weather working day. If she were detained beyond the time stipulated for loading, demurrage was to be paid at so much a day. The vessel arrived at the port of loading early in October. If she had loaded at the specified rate she could have loaded and could lawfully have carried to the port of discharge on or before October 31 a full and complete cargo of 850 standards, and the shipowners would have earned freight on the full cargo; but, from causes for which the owners were not responsible, she had loaded no more than 544 standards by October 17, and could not then reach the port of discharge by October 31, and so could not carry more than this amount of cargo without infringing s. 10 of the Merchant Shipping Act, 1906. The owners claimed dead freight on 306 standards:—

Held, that the charterers were not entitled as of right, upon payment of the sum due for demurrage, to detain the vessel beyond the time stipulated for loading; but that in so detaining her they had committed a breach of the charterparty; that as through this breach they were prevented from loading a full cargo, they were liable in damages as for dead freight beyond the sum due for demurrage; and further, that the sum named for demurrage was not intended as liquidated damages for breach of the obligation to load a full cargo.

Dictum of Lord Trayner in *Lilly & Co.* v. *Stevenson & Co.* (1895) 22 R. 278, 286, explained.

Judgment of Greer J. [1926] 2 K. B. 83 affirmed.

APPEAL from the judgment of Greer J. (1)

By a charterparty made in London on May 26, 1923, it was agreed between the agents for Aktieselskabet Reidar, the owners of the steamer *Sagatind* of 964 tons net register and of about 850 St. Petersburg standards deals capacity, and Arcos, Ld., of London, that the steamer should after

(1) [1926] 2 K. B. 83.

delivering a cargo proceed to Mesane and there load from the agents of the charterers a full and complete cargo of mill sawn deals, etc. The steamer was to be provided with a deck load, at full freight, at the charterers' risk, not exceeding what she could reasonably stow and carry over and above her tackle, provisions, and furniture, and being so loaded, was to proceed therewith to London or east coast of the United Kingdom or west coast of England or Scotland or the English Channel or North France or Holland or Belgium or French Bay-port not south of Bordeaux at the charterers' option, one port only, as ordered on signing the bill of lading or at Lodingen, and to deliver the cargo on being paid freight as follows :—

The freight to London, east coast of the United Kingdom, North France (not west of Calais), Holland, or Belgium was for deals, battens, and boards for cargo 3*l.* 10*s.* 6*d.* per St. Petersburg standard hundred of 165 cubic feet; and 3*s.* per standard extra for deals, etc., under 1 inch, boards exceeding one-third of the cargo, bundled goods and ends beyond such as were required for broken stowage. To the west coast of England, Scotland, English Channel, North France (west of Calais) 3*l.* 13*s.* To a French Bay-port, not south of Bordeaux, 3*l.* 15*s.*

By clause 3 of the charterparty the steamer was to be reckoned as a four-hatch steamer and the cargo was to be loaded at the rate of 80 standards per weather working day for deals and battens and 60 standards for other goods, the steamer having four winches, and being discharged with the customary steamship dispatch as fast as the steamer could receive and deliver during the ordinary working hours of the respective ports but according to the custom of the respective ports, Sundays and general or local holidays in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage was to be paid at 25*l.* per day, and pro rata for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary. . . . .

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By clause 20 the steamer was "to pay the charterers 9*s.* per standard on the quantity of cargo on which freight is paid to cover the cost of stevedoring, port dues, pilotages, etc., at the loading port, and the steamer to be free of any other expenses there, notwithstanding anything in this charterparty which may appear to the contrary, excepting that the steamer is to clear with the Russo-Norwegian Navigation Co., Ld., at the loading port paying an agency fee of 10 guineas and to give the use of winches in loading."

Through no fault of the owners the steamer was delayed in London in discharging her former cargo until the middle of September, 1923, and therefore, in the fear that Mesane might be inaccessible owing to ice, the following document was signed by agents for the parties: "Agreement. Referring to the charterparty per ss. *Sagatind* dated May 26, 1923, from Mesane to the United Kingdom or Continent it is hereby mutually agreed that the steamer is to load at Archangel instead of at Mesane and at the basis rate of freight of 67*s.* 6*d.* per standard. All other conditions of charterparty to apply."

The steamer arrived at Archangel on October 3. Notice of readiness to load was given on October 4. If she had loaded within the time stipulated for loading she would have taken on board a full summer cargo of 850 standards by October 17. By October 23 she had loaded no more than 544 standards. She was ordered to Manchester, a port in the United Kingdom to which the provisions of the Merchant Shipping Act, 1906, apply. The learned judge held that he was entitled to read the charterparty as if it had named Manchester as the port of discharge.

The plaintiffs claimed dead freight on 306 standards at 70*s.* per standard, i.e. 1101*l.* less the cost of discharging the 306 standards, i.e. 112*l.* 13*s.*, leaving a sum of 988*l.* 7*s.*

The defendants pleaded that on October 24, when the steamer left Archangel for Manchester, a full and complete cargo was a winter deck load and that the vessel was loaded with a winter deck load. They admitted that they had incurred demurrage for 11¼ days at 25*l.* a day on account of which they had paid for 6¼ days.

The learned judge held that on the true construction of the charterparty a full and complete cargo meant a full summer cargo of 850 standards; that the obligation of the defendants was to load the vessel within the time specified for loading and that they had committed a breach of this obligation, notwithstanding the provision relating to demurrage, which did not, in his opinion, convert the demurrage days into mere lay days in accordance with the view expressed by Lord Trayner in *Lilly & Co.* v. *Stevenson & Co.* (1) He therefore gave judgment for the plaintiffs for 988*l.* 7*s.*

The defendants appealed.

Le Quesne K.C. and *Somervell* for the appellants. The learned judge was wrong in holding that the appellants committed any breach of the charterparty in failing to load the ship within the lay days and in becoming liable for demurrage. "Days stipulated for by the merchant, on demurrage, are just lay days, but lay days that have to be paid for": per Lord Trayner, *Lilly & Co.* v. *Stevenson & Co.* (1); and see the opinion of the same learned judge in *Gardiner* v. *Macfarlane & Co.* (2) Demurrage, properly so called, is not in the nature of liquidated damages for a breach of a charterparty; it is an agreed payment for the use of the ship beyond the lay days: *Lockhart* v. *Falk* (3); Carver on Carriage by Sea, 7th ed. (1925), § 609, p. 829; Scrutton on Charterparties, 12th ed. (1925), art. 128, p. 347; Abbott's Merchant Shipping, 14th ed. (1901), p. 371. Under the old system of pleading, indebitatus assumpsit lay for demurrage, but a plaintiff claiming liquidated damages was obliged to declare specially: Bullen and Leake's Precedents, 3rd ed., pp. 130, 217.

[SARGANT L.J. referred to *Patrick* v. *Milner* (4) and *Howe* v. *Smith.* (5)]

The better opinion is that a charterer is entitled to keep the ship at least a reasonable time beyond the lay days:

(1) 22 R. 278, 286.
(2) (1889) 16 R. 658, 660.
(3) (1875) L. R. 10 Ex. 132.
(4) (1877) 2 C. P. D. 342.
(5) (1884) 27 Ch. D. 89.

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Wilson v. *Otto Thoresen's Linie* (1); *Inverkip Steamship Co.* v. *Bunge. & Co.* (2)

But assuming that this is not the meaning of demurrage in this charterparty, and that the word means, in the language of Lord Salvesen in *Moor Line* v. *Distillers Co.* (3), "agreed damages to be paid for delay of the ship in loading . . . . beyond an agreed period," the owners cannot recover anything beyond the agreed damages: *Ethel Radcliffe Steamship Co. v. W. & R. Barnett, Ld.* (4)

[*Procter Garrett Marston, Ld.* v. *Oakwin SS. Co.* (5) was also cited.]

A. T. Miller K.C. and *Sir Robert Aske* for the respondents. The obligation of the appellants under this charterparty was twofold: first, to load a full cargo; secondly, to load that cargo within the lay days, i.e., by October 17. It follows that they were bound in the first instance to load such a cargo as would answer the description of a full cargo at that time, that is to say a cargo of 850 standards. By their own fault or misfortune, in no way contributed to by any act of the respondents, they have failed to do this, and have consequently committed a breach of the charterparty which they must make good.

Their second obligation was to load in a fixed number of lay days, or the equivalent of a fixed number, that is a number which can be ascertained by mere calculation. For breach of this obligation, but not for breach of the obligation to load a full cargo, the damages are agreed by clause 3 of the charterparty at 25*l.* a day. The appellants have committed a breach of this obligation and must pay the agreed damages; but that does not absolve them from what Greer J. has called the primary obligation to load a cargo of 850 standards.

[*William Alexander & Sons* v. *Aktieselskabet Hansa* (6) was also cited.]

Le Quesne K.C. in reply.

Cur. adv. vult.

(1) [1910] 2 K. B. 405.
(2) [1917] 2 K. B. 193.
(3) 1912 S. C. 514, 520.
(4) (1926) 31 Com. Cas. 222.
(5) [1926] 1 K. B. 244.
(6) [1920] A. C. 88.

July 22. The following written judgments were delivered.

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BANKES L.J. This appeal raises a question of very considerable general importance, and one upon which there appears to have been some difference of judicial opinion.

The action was brought by shipowners against charterers for damages for breach of a charterparty. The breach alleged was a failure to load a full and complete cargo. Greer J. decided in the plaintiffs' favour, and he founded his decision upon the view that what constituted a full and complete cargo must be ascertained by reference to those stipulations of the charterparty which provided for the rate at which the charterers had undertaken to load. For the reason which I refer to later the plaintiffs' claim (if any) must, I think, be based upon a breach of the stipulations as to the rate of loading, and the case thus presented raises the two important questions: whether, having regard to the terms of the charterparty, there was any breach on the part of the charterers; and, if there was, then whether the breach is satisfied by a payment of demurrage at the stipulated rate.

The material facts are as follows. The charterparty was dated May 26, 1923, and it provided that the steamer should proceed to Mesane after completing her then intended voyage and there load a full and complete cargo of timber for a port in the United Kingdom or North France, Holland or Belgium at the charterers' option. Orders were to be given on signing bills of lading or at Lodingen. Time was not to count before July 15. The clause dealing with the loading and discharging was, so far as is material, in the following terms. "Steamer to be reckoned as a four-hatch steamer and the cargo to be loaded at the rate of 80 standards per weather working day for deals and battens and 60 standards for other goods. Should the steamer be detained beyond the time stipulated for loading demurrage to be paid at 25*l.* per day and pro rata for any part thereof." Owing to delay in completing her then intended voyage, the vessel was not ready to proceed to Mesane at the time contemplated by the charterparty. After some discussion as to what should be done, the parties

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ultimately agreed on September 19 to substitute Archangel for Mesane at an altered rate of freight, "all other conditions of charterparty to apply." The vessel proceeded to Archangel and arrived there on October 3. The position created by the delay in arriving at the port of loading was a peculiar one, if the vessel was ordered to a port in the United Kingdom, owing to the provisions of the Merchant Shipping Act, 1906. Unless the vessel could arrive on or before October 31, the master or owner would be liable to a fine if he carried a larger deck cargo than is specified in s. 10 of that Act. If the vessel could have been fully loaded, and could have sailed on or before October 20 so as to arrive at a port in the United Kingdom on or before October 30, she could have carried 850 standards. If the loading was delayed so as to prevent the vessel sailing on or before October 20 she could only carry 544 standards without infringing the provisions of s. 10. If the charterers had commenced to load the vessel as soon as notice of readiness had been received, and had loaded her on an average at the agreed rate for $11\frac{3}{4}$ days, the full 850 standards would have been put on board and the vessel could have sailed in plenty of time to enable her to have arrived in a United Kingdom port before October 30. What in fact happened was that the cargo was not loaded at the agreed rate, and by October 23 she had only 544 standards on board. By that time it was impossible for the vessel to arrive at a United Kingdom port before October 30, and the master anticipating, or being told (it does not appear which), that he would be ordered to a United Kingdom port, refused to take any more cargo. The entry in the deck log is as follows: "Tuesday 23rd. Loading from 8 A.M. until 4.30. Was then fully loaded. Height of deck cargo is level with the railings," clearly indicating that the master had in mind the restrictive provisions of s. 10 of the Merchant Shipping Act. The orders given to the master on signing the bill of lading were that he was to proceed to Lodingen for orders. When he arrived there he was ordered to Manchester.

I see a difficulty upon the facts in saying that the vessel did not load a full and complete cargo, as it appears to me

that the time for ascertaining whether she had or had not a full cargo is the time when she sailed. At that time, assuming her destination to be a port in the United Kingdom, she had a full and complete cargo. Whether this is or is not a correct view of the facts is really immaterial, because assuming that the obligation to load a full and complete cargo, and the obligation to load the cargo (that is, the goods of which the cargo consists) at a stipulated rate are separate and distinct obligations, which I think they are, the plaintiffs are still entitled to say that but for the failure to load at the agreed rate they would have received 850 standards on board instead of the 544 which they in fact received. In whichever way the case is put the same two questions arise to which I have already referred, both of which are of importance, and upon neither of which can I find any direct authority which is binding upon this Court, though upon the first of the two questions judicial opinion has been by no means unanimous.

The answer to the first question depends upon what is the true view of a contract expressed as this charterparty is, with a fixed number of lay days, and with a provision as to the demurrage rate, but with no provision for any fixed number of days on demurrage. The view of Cleasby B. of what is meant by demurrage as expressed by him in *Lockhart* v. *Falk* (1) is often referred to and may well be quoted again. He says: "The word 'demurrage' no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charterparty containing the clause in question we must collect what is the proper meaning to be assigned to it." It will be noted that the learned judge draws the distinction between the "allowed detention" and the "undue detention." It may well be that where a charterparty, as in *Francesco* v. *Massey* (2), provides for a given number of days (in that case ten days) on demurrage, so much of the much discussed judgment of Lord Trayner in

(1) L. R. 10 Ex. 132, 135. (2) (1873) L. R. 8 Ex. 101.

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Lilly & Co. v. *Stevenson & Co.* (1), as holds that "days stipulated for by the merchant, on demurrage, are just lay days, but lay days that have to be paid for," is well founded. In the present case it is not necessary to express any opinion upon that particular point.

What we are here dealing with is what Cleasby B. refers to as undue detention. In dealing with this question it is necessary to bear in mind one of the outstanding features of the contract contained in a charterparty. It is well established that even where the number of lay days for loading and discharging, or for loading or discharging, is fixed, time is not of the essence of the contract. The shipowner is not entitled, merely because the lay days have expired, and the contract is not completed, to treat the contract as at an end and to withdraw his ship. It is for this reason, I think, that the stipulation for a demurrage rate is so often inserted in the contract in order that, if the vessel has to remain so as to enable the charterer to complete his obligation, either of loading or discharging, the parties may know what sum will have to be paid for the detention. In the *Ethel Ratcliffe* case (2) it appears that Roche J. in the *Procter* case (3) and this Court in the *Ethel Ratcliffe* case (4) left the point over for future decision whether the obligation upon the shipowner to keep his ship at the port of loading or discharge or at the port of call, as the case may be, after the expiration of the time limited by the charterparty for the performance by the charterer at the port of some obligation undertaken by him to be performed there, rests upon an implied term of the contract, or upon the necessity that the master shall remain a reasonable time before he is in a position to say that the conduct of the charterers in not performing their obligation amounts to a repudiation of the contract. I see no sufficient reason for construing the provision for demurrage as contained in the charterparty in the present case as a contractual extension of the lay days either for a reasonable time or for any other time, or as an

(1) 22 R. 278, 286.
(2) 31 Com. Cas. 222, 230.
(3) [1926] 1 K. B. 244.
(4) 31 Com. Cas. 222.

implied term of the contract that the vessel shall remain for any time. I prefer to rest the necessity for remaining upon the ground that, time not being of the essence of the contract, the shipowner will not, except under some exceptional circumstances, be in a position to assert that the contract has been repudiated unless the vessel does remain a sufficient time to enable that question to be tested. If this is the correct view it follows that where a charterparty is in the terms of the present charterparty, and the charterers fail to load or to discharge, as the case may be, within the agreed lay days, or at the stipulated rate, they do commit a breach of contract. So far as there is any authority on the point I think that it is in favour of the view which I have expressed. I do not feel sure that Lord Trayner's language (1), in the passage in which he says that where the demurrage days are not limited by contract they will be limited by law to what is reasonable in the circumstances, has not been strained beyond what was really intended. It is, I think, consistent with that language that what the learned judge had in mind was the obligation of the vessel to remain even after the expiration of fixed lay days where there is a provision for demurrage. Be that as it may, Lord Trayner's view and Mr. Carver's approval of it have quite recently been expressly disapproved by Scrutton L.J. in this Court in *Inverkip Steamship Co.* v. *Bunge & Co.* (2) The only case which I can find in which any approval of Lord Trayner's view has been expressed in this Court is the *Saxon Ship Co.* v. *Union Steamship Co.* (3), where A. L. Smith L.J. was dealing with a case as between vendor and purchaser of coal in whose contract the colliery guarantee was incorporated. The guarantee provided for lay days and for demurrage. The point for decision was the date when the purchasers made default, and it was in that connection that the Lord Justice referred to Lord Trayner's decision with approval, and he may well have been confining his remarks to so much of that decision as referred to the fixed days on demurrage. Thinking, as I do, that this

(1) 22 R. 286. (2) [1917] 2 K. B. 193, 203.
(3) (1899) 4 Com. Cas. 298, 303.

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particular point is free from authority, and that I am at liberty to express my own opinion, I agree with Greer J. in coming to the conclusion that at the termination of the fixed lay days the charterers in the present case were in breach.

The only question which remains for decision, therefore, is the question of damages. If the plaintiffs' claim was in substance, though not in form, a claim for detention of the vessel, the special damage here claimed for would not be recoverable: *Inverkip Steamship Co.* v. *Bunge & Co.* (1) Upon the special facts of this case the plaintiffs' claim appears to me to be, both in substance and in form, essentially distinct from any claim for the detention of the vessel. In substance what the plaintiffs are saying is that if the charterers had loaded the goods at the agreed rate they would have earned freight on 850 standards, whereas owing to the failure to load at that rate they could only earn freight on 544 standards, and that their loss directly flowing from the breach of contract is the difference between the amount of freight which they would have earned and the amount which they in fact earned. This loss is, in my opinion, on the facts of this case recoverable as damages for the breach of contract to load at the agreed rate.

At one time I was inclined to think that where parties had agreed a demurrage rate, the contract should be construed as one fixing the rate of damages for any breach of the obligation to load or discharge in a given time. On further consideration I do not think this view is sound. I can find no authority on the point, and it is noticeable that in the *Saxon Ship Co.* v. *Union Steamship Co.* (2) it was not suggested that the claim for demurrage excluded the additional claim for special damage arising from the detention of the vessel.

In my opinion the appeal fails and must be dismissed with costs.

ATKIN L.J. This case raises a question of considerable importance in shipping circles, and it is surprising that there is so little direct authority to guide us. The question is

(1) [1917] 2 K. B. 193. (2) 4 Com. Cas. 298.

whether, if the charterer has failed to complete the loading of the ship within the lay days, and the ship during the demurrage days becomes, without the default of the shipowner, unable to carry as much cargo as she would have carried if loaded within the lay days, but receives from the charterer a full cargo for her diminished capacity, the loss falls upon the charterer in addition to the demurrage. In my opinion our decision should be for the shipowner. The result of the authorities appears to be that in a contract fixing a number of lay days and providing for days at demurrage thereafter, the charterer enters into a binding obligation to load a complete cargo within the lay days subject to any default by the shipowner or to the operation of any exceptions, matters which do not arise in this case. If the lay days expire without a full cargo having been loaded the charterer has broken his contract. The provisions as to demurrage quantify the damages, not for the complete breach, but only such damages as arise from the detention of the vessel. For correlative to the ship's right to receive the agreed damages is the charterer's right to detain the ship for the purpose of enabling him, if possible, to perform his broken contract and so mitigate any further damage. If however, for reasons other than the shipowner's default, the charterer becomes unable to do that which he contracted to do—namely, put a full and complete cargo on board during the fixed lay days, the breach is never repaired, the damages are not completely mitigated, and the shipowner may recover the loss that he has incurred in addition to his liquidated demurrage or his unliquidated damages for detention. It appears to me to be incorrect to say that days on demurrage are extended lay days, unless the contract is so drawn. On the contrary demurrage days are days in which the charterer is in breach, and this view alone explains what I conceive to be the well established principle that, unless by express stipulation, exceptions that would protect the charterer during lay days no longer protect him during demurrage days. If a stipulation for demurrage either directly extended the contract time for performance or waived a breach, there

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could be no difference between illegality supervening during the lay days, or after the lay days and during demurrage days. Yet in *Reid* v. *Hoskins* and *Avery* v. *Bowden* (1) and *Esposito* v. *Bowden* (2), all in the Exchequer Chamber, it is plain that the decisions treated as material the allegation or proof that the illegality (outbreak of war and consequent trading with the enemy) occurred during the lay days, that is, during the time for performance and before breach. In those circumstances the charterer was excused. I know of no authority that subsequent illegality would relieve the charterer of the consequences of his accrued breach. If the occurrence were one which would occasion the frustration of the contract, then on principles established in England, though not in Scotland, the contract would end, with accrued liabilities left subsisting.

It is said, however, that in this case there is no evidence that the charterers had not furnished and were not willing to load a cargo sufficient to satisfy a summer loading. I will assume that such a cargo was available. Nevertheless it appears to me that, the charterers having exercised their option to order the ship to the United Kingdom, the charter must be treated for all purposes as a United Kingdom charter. In the circumstances of this case I am satisfied that they made it clear to the master when they ceased loading that the eventual destination was the United Kingdom. If this be so the charterers had no right to put on board, and the master was entitled to reject, any further cargo that would expose him to penalties under the Merchant Shipping Act if carried within the winter months. The excess cargo over the winter load would not be a lawful cargo. The ship therefore sailed with what was a complete cargo at the date of sailing, but less than a complete cargo if the loading had been completed within the lay days. For any damages caused thereby I think that the charterers are liable. No question of the amount of damages arises here.

I think, therefore, that the appeal fails and should be dismissed with costs.

(1) (1856) 6 E. & B. 953, 972. (2) (1857) 7 E. & B. 763.

SARGANT L.J. In my opinion the judgment of Greer J. should be affirmed.

The original charterparty of May 26, 1923, undoubtedly contemplated that the ship should carry a full cargo of 850 standards. And when on the failure of that contract the charterparty now in question was made on September 19, 1923, by indorsement on the original charterparty, and adopted with some variations the terms of the original contract, it seems to me that the parties must have been contemplating the same full cargo. There was ample time, as was proved by the event, for the ship to reach Archangel in good time to load a full cargo and sail with it for any of the specified British ports without the risk of any objection on arrival. And it is not immaterial in construing this part of the contract to observe that the charterers had the option of proceeding to any one of a number of foreign ports at which no objection could arise. This view gives a plain and straightforward meaning to the words used and does not, I think, impose any unreasonable obligation on the charterers. For it is no doubt implied that the ship shall reach Archangel in time to load a full cargo, either for a British port or for a foreign port at the option of the charterers; and, should the arrival of the ship at Archangel be delayed so as to render the alternative of proceeding to a British port with a full cargo unavailable, the charterers if electing to proceed to a British port and loading a winter cargo only could set up the default of the ship in arrival against any claim for failure to load more than such a cargo as would satisfy the requirements of British ports.

Further, if the meaning of the phrase "full and complete cargo" in clause 1 is to be interpreted (as the appellants have urged) with reference to the cargo which could lawfully be carried to a British port, the result must be the same. For the time at which that cargo must be ascertained is, in my judgment, the time when the charterers received the ship for loading, that is October 4, and not the time at which they ceased to load in fact. It cannot be that by their delay in loading they were entitled to diminish the extent of the

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cargo which they were under obligation to load, and thus take advantage of their own default.

It is next necessary to consider the effect of clause 3 of the charterparty. Here I agree with the view of the learned judge that the second sentence of that clause does not enlarge the express obligations as to time of loading expressed in the first sentence of the clause, but merely assesses damages at 25*l.* a day for any detention of the ship due to a failure of the charterers to load at the prescribed rate, and incidentally indicates that their obligations in this respect are not of the essence of the contract, and that some unpunctuality in this respect will not entitle the owners to treat the contract as repudiated and to withdraw their ship. Such a construction gives full effect to the language of the clause and is consistent with the views expressed in the text-books on the subject which summarize the general effect of the decisions: see Scrutton on Charterparties, 12th ed., p. 348, and Carver on Carriage by Sea, 7th ed., pp. 828–9 and note on p. 907. And this is in accordance with the view taken of somewhat analogous provisions in contracts for the sale and purchase of property: see *Patrick* v. *Milner* (1) and *Howe* v. *Smith*. (2)

On the footing then that clause 3 of the charterparty fixes the damages for the detention of the ship at 25*l.* a day, does the payment of a sum calculated on this basis form an agreed compensation for the loss which the owners have sustained in the circumstances of this case? I cannot think so. The loss inflicted on the owners and claimed by them is loss of another character—namely, loss of freight caused by the breach by the charterers of their contract to load a full and complete cargo, as prescribed by clause 1 of the charterparty. The obligation of clause 1 is, in my judgment, rightly described by the learned judge as the primary obligation. The object of the second sentence of clause 3 is to provide compensation for a detention of the vessel in the course of fulfilling this primary obligation, not to give compensation for the breach of the primary obligation itself. No doubt the same delay

(1) 2 C. P. D. 342. (2) 27 Ch. D. 89.

in loading, which might give rise to a claim for detention, also resulted in a breach of the obligation to load a full cargo, but the breach of this latter obligation caused a definite separate loss independent of and largely exceeding any loss arising from mere detention. Or, to put the matter in another way, the object of the second sentence in clause 3 being to ascertain the damages arising from a delay in loading for the purpose and in the course of fulfilling the primary obligation of clause 1—namely, the loading of a full cargo, it would unwarrantably widen the scope of this second sentence, if it should also ascertain the damages arising from a breach of the primary obligation itself.

The same result would I think follow if, contrary to the view above expressed, the second sentence of clause 3 were to be read as an agreement that the charterers might have some extra time for loading at an agreed rate per day. Even on this interpretation this could not in my view be read as extending further than an agreement to allow some extra time for the purpose of loading a full cargo. It could not properly be construed as an agreement that such an extra time might be occupied in loading as to diminish the quantity of cargo that had ultimately to be loaded.

There was a further contention on the part of the appellants that should perhaps be noticed—namely, that they had only to provide cargo, not to load it, and that there was no evidence that they had not provided a full summer cargo. In my judgment, under this charterparty, the charterers had both to provide and load; and there is no evidence that there was any default on the part of the ship to provide the assistance mentioned in clause 20. Nor is it shown that the master at any time declined to accept more than a winter cargo. From his letters of October 10 and 19 I should gather that he was willing to accept a full summer cargo provided that, if he was ordered to sail after October 20 to a British port, provision was made for the fines he might incur. The points mentioned in this paragraph are not the real points in issue between the parties, they are not raised by the charterers'

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defence in the action, and they do not seem to have been argued before the learned judge.

Appeal dismissed.

Solicitors for appellants: *Wynne-Baxter & Keeble.*
Solicitors for respondents: *Botterell & Roche.*

W. H. G.

1926
Oct. 15.

OUTERBRIDGE *v.* OUTERBRIDGE.

Husband and Wife—Maintenance Order—Adultery of Wife—Discharge of Order—Liability of Husband for weekly Payments before Discharge—Enforcement of Order—Summary Jurisdiction (Married Women) Act 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 5, 6, 7, 9.

By the Summary Jurisdiction (Married Women) Act, 1895, s. 6: "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery. . . . ." By s. 9 "the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

An order for maintenance made against a husband on the wife's application under the Summary Jurisdiction (Married Women) Act, 1895, was afterwards discharged by the justices on the ground of the wife's adultery. At the date of the discharge arrears of maintenance were due to the wife and upon a summons by her to enforce payment the justices made an order for payment by instalments of 2*l.* a week and for attachment of the husband's income under the Affiliation Orders Act, 1914:—

Held, upon a case stated, that the order of the justices was right, inasmuch as the order for payment of arrears was not an order within the Summary Jurisdiction (Married Women) Act, 1895, s. 6, but was an order for enforcement of payment within s. 9 of that Act, and was regulated by the Bastardy Laws Amendment Act, 1872, as under an order for affiliation.

Held also, that the arrears accrued due before the discharge of the original order were recoverable up to the date of proof of the adultery, and not only up to the date when adultery took place.

Ruther v. *Ruther* [1903] 2 K. B. 270 applied.

CASE stated by Surrey justices.

The case arose out of an application by the respondent for the committal of her husband, the appellant, on the ground of non-compliance with an order for maintenance

made under the Summary Jurisdiction (Married Women) Act, 1895. The order for maintenance was made on April 15, 1915, when the husband was ordered to pay 2*l.* a week until such order should be discharged or varied. Payments under the order fell into arrear, and a summons was taken out for payment of arrears up to February 14, 1924. Proceedings were at the same time taken by the husband for discharge of the original order on the ground of adultery by the wife. On February 14, 1924, the original order was discharged and the summons for arrears postponed. The justices heard the summons on January 21, 1926, when they ordered the husband to pay arrears up to February 14, 1924, by instalments of 2*l.* a week. Under the Summary Jurisdiction (Married Women) Act, 1895, s. 9, and the Affiliation Orders Act, 1914, s. 2, they also ordered the attachment of the husband's income from the Public Trustee for payment of the arrears, which amounted to 390*l.* The grounds for their decision were that the original order for maintenance was only discharged as from February 14, 1924, and that the arrears then existing of 390*l.* were still due to the respondent. At the request of the husband a case was stated by the justices for the opinion of the Court.

Wellesley Orr (*F. W. Wallace* with him) for the husband. By the Summary Jurisdiction (Married Women) Act, 1895, s. 6, no orders are to be made under the Act on the application of a married woman after proof of adultery on her part. The order made by the justices here for payment of arrears is an order made under that Act. By s. 7 such order upon proof of adultery is to be discharged, and, when thus discharged, can no longer form the basis of any further application to the justices in respect of arrears or otherwise. *Ruther* v. *Ruther* (1) is not a parallel case to the present; for there the Court was dealing with a warrant of committal issued by the justices under the Bastardy Laws Amendment Act, 1872, for non-payment of arrears of maintenance under an order which in fact had not been discharged. Moreover,

(1) [1903] 2 K. B. 270.

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in that case, the appellant admitted his liability to pay the arrears up to the date when the order should have been discharged. Here the husband's appeal is both against the order to pay the arrears and also against the order as to their collection. An application for arrears under an order can only be made whilst the order itself is still in existence.

J. D. Young for the wife. The order for the enforcement of payment of arrears is taken out of the Act of 1895 by s. 9, which provides that payment may be enforced "in the same manner as the payment of money is enforced under an order of affiliation." This order relates to the enforcement of payment of arrears due under the original order for maintenance and before its discharge. Such an order, as on an affiliation order, is made under the Bastardy Laws Amendment Act, 1872, and the Affiliation Orders Act, 1914: *Ruther* v. *Ruther*. (1) It is clear also from that case that arrears can be recovered up to the date when the adultery on the part of the wife is proved, but not afterwards. We only claim payment of arrears here up to that date.

Orr in reply referred to *Matthews* v. *Matthews*. (2)

LORD HEWART C.J. [after stating the facts and the history of the case continued:] The chief ground of this appeal was that the justices were functi officio and had no power to order payment of the arrears of maintenance after the order was discharged even though they had accrued due before the date of discharge. It was argued that once the order had been discharged there was no power to recover the arrears which ought to have been paid. The basis of this contention is to be found in the Summary Jurisdiction (Married Women) Act, 1895, s. 6. Sects. 4 and 5 deal with the powers of the court of summary jurisdiction to make orders on the application of a married woman (inter alia) for weekly payments by the husband to her. It is then provided by s. 6: "No orders shall be made by this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that

(1) [1903] 2 K. B. 270. (2) [1912] 3 K. B. 91.

the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery." It was argued that the order of the justices which forms the subject of this appeal is an order under the Act of 1895. It is true that the original order was made under that Act, but there is a distinction between an order made under the Act and an order for the enforcement of payment of money which became due under the original order. By s. 9: "the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." That is to say, that for the enforcement of payment of such sums the procedure is not to obtain an order under the Act of 1895, but as on an affiliation order under the Bastardy Laws Amendment Act, 1872. In *Ruther* v. *Ruther* (1) Lord Alverstone said: "The Act of 1895 provided a new and amended procedure for making orders for the maintenance of wives, and by s. 9 it is enacted that the payment of any sum of money directed to be paid by an order under the Act may be enforced in the same manner as the payment of money is enforced under an order for affiliation. The procedure for enforcing payment is, therefore, regulated by s. 4 of the Bastardy Laws Amendment Act, 1872, which empowers magistrates where an order for payment has not been obeyed, and no sufficient distress can be had, to commit the defendant to prison for any term not exceeding three months"; and again Wills J. said: "Orders for payment made under the Act of 1895 are by s. 9 to be enforced in the same way as affiliation orders: and on looking at s. 4 of the Bastardy Laws Amendment Act, 1872, one sees what the procedure is. Therefore an order of committal for non-payment is not an order made under the Act of 1895 and is not one to which s. 11 of the Act applies." There is in other words a clear distinction between the statute under which the original order was made and the steps by which it is sought to enforce payment. Wills J. then went on to say: "It is clear that there is no power to order

(1) [1903] 2 K. B. 270, 274, 275.

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Lord Hewart C.J.

committal for non-payment of the weekly sum after adultery on the part of the wife has been proved." In these circumstances and as a result of *Ruther* v. *Ruther* (1) and other decisions it appears that notwithstanding the discharge of the maintenance order itself it was still open to the justices to make an order for the payment of the arrears which had accumulated before the order was discharged. As to the course adopted by the justices it is plain from the statutory rules made under the Affiliation Orders Act, 1914, that they were acting within their powers. I have accordingly come to the conclusion that the justices were right and that the appeal must be dismissed.

AVORY J. I have considerable doubt whether an order made under the Act of 1895, once it has been discharged, can afterwards be enforced. I am also doubtful whether this order of the justices made in 1926 is an order made under the Act of 1895 or not. If it is, then it would appear from s. 6 that they had no power to make such an order after proof of the wife's adultery. But it was decided in *Ruther* v. *Ruther* (2) and other cases that an order for enforcement of payment of arrears of maintenance due to a wife is not an order under the Summary Jurisdiction (Married Women) Act, 1895. By that Act it is provided (s. 9): "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." It appears by implication from *Ruther* v. *Ruther* (2) that, upon an application to enforce payment of arrears, a wife can recover payment up to the date when adultery is proved and not only up to the date when adultery actually took place. The judgments of Wills and Channell JJ. in *Ruther* v. *Ruther* (2) support the contention of the respondent in this case. Channell J. said in that case: "That being so, the appellant's liability to continue the payments ceased after the adultery had been proved." The natural deduction is that that liability continues until the date when the adultery is proved.

(1) [1903] 2 K. B. 270, 274, 275. (2) [1903] 2 K. B. 270, 276.

In these circumstances I do not dissent from the judgments of the rest of the Court.

SALTER J. I agree that the justices had jurisdiction to make this order. The maintenance order was discharged, not quashed, by the order made on February 14, 1924. Arrears were then due to the wife, and the question is whether she can recover them. It is argued that the justices have no jurisdiction to order their payment, because the order was made under the Act of 1895, and that by s. 6 of the Act maintenance cannot be recovered when adultery is proved. The jurisdiction of the justices to make the order is derived partly from the Summary Jurisdiction (Married Women) Act, 1895, and partly from the Bastardy Laws Amendment Act, 1872, and other Acts. In a sense the order for recovery of arrears of maintenance is made under the Act of 1895, but it is not one of the orders referred to in s. 6 of that Act. To hold otherwise would be to infringe upon the decision in *Ruther* v. *Ruther* (1), to which attention has been called. As to the second point it appears that the justices have jurisdiction to make an order for payment of arrears not only up to the date when adultery was committed, but up to the date when proof of the adultery was given and the original order was discharged.

Appeal dismissed.

Solicitor for appellant: *J. T. Lewis.*

Solicitors for respondent: *Cardew Smith & Ross.*

(1) [1903] 2 K. B. 270.

F. P. F.

C. A.
1926
Oct. 25.

[IN THE COURT OF APPEAL.]

IDEAL FILMS, LIMITED *v.* RICHARDS AND OTHERS.

Practice—Equitable Execution—Unregistered Association—Action against—Representation Order—Enforcement of Liability—Property of Defendants vested in Trustees—Joinder of Trustees as Defendants to Action—Order XXV., *r.* 4.

An action was brought against an unregistered association for the hire of articles supplied, and a representation order was obtained against the committee of the association directing that they should defend the action on behalf of all the members. The plaintiffs claimed to join as defendants to the action certain persons in whom property belonging to the association was vested as trustees. In their statement of claim they made it clear that the trustees were only being sued in that capacity, and that no claim was being made against them personally for either the money debt or the costs of the action :—

Held, that as under the circumstances no inconvenience or embarrassment could result from such joinder of the trustees the plaintiffs were entitled to join them.

APPEAL from Horridge J. at chambers.

The action was brought against W. R. Richards and sixteen other defendants.

The statement of claim, which as originally drawn did not contain the words set out below in italics, alleged as follows :—

1. "The Llanbradach Workmen's Hall and Institute is an unregistered association of miners and other workmen employed at Llanbradach, South Wales. The first eleven defendants are and were at all material times members of the said association, and also are and were the members of a committee appointed by the general body of members to conduct the affairs of the association on the members' behalf, *and are sued as representing the general body of the members.* The remaining defendants are and were at all material times the trustees of the said association, and the funds of the association and certain leasehold premises situate at Llanbradach the property of the association are and were vested in them as such trustees. *The said funds and premises are and were at all material times the common*

property of the members of the association and vested in the trustees upon trust for the members."

2. "The said association has for some years carried on upon the said premises a cinematograph theatre for the benefit of the members, and has hired films for the purpose of exhibition at the said theatre."

3. "By various contracts in writing made between the plaintiffs and the said committee acting for and on behalf of the members of the said association, the plaintiffs agreed to supply the films therein mentioned for exhibition at the said theatre upon the terms and at the prices specified in the said contracts. The plaintiffs duly supplied the said films, and the sum of 234*l.* 7*s.* 8*d.* is due and owing to the plaintiffs in respect of the films."

"The plaintiffs claim

1. 234*l.* 7*s.* 8*d.*" (for which in the claim as amended was substituted) "*A declaration that the sum of* 234*l.* 7*s.* 8*d. is due and owing to the plaintiffs from the members of the said association.*"

2. "An order directing the said trustees to pay the said sum, *together with the costs of this action*, to the plaintiffs out of the property and assets of the said association in the hands of the said trustees."

3. "An order charging the said property and assets with payment of the said sum *and costs* to the plaintiffs."

The plaintiffs obtained a representation order directing that the first eleven defendants should defend the action on behalf of the members of the association. Horridge J. made an order under Order XXV., r. 4, that the last six defendants should be dismissed from the action on the ground that the statement of claim, so far as it concerned them, disclosed no reasonable cause of action, and was frivolous and vexatious.

The plaintiffs appealed.

Done for the appellants. Where, as here, an unregistered association is sued in a representative action and property is held by trustees on the association's behalf, the trustees may be joined as defendants in order that the plaintiffs if

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successful may be able to enforce their judgment. In *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1), where the action was against a registered trade union, Lord Lindley said that if it had been unregistered some of its members might have been sued as representing all the members of the society, and a judgment for damages could be obtained in an action so framed; and he added: "Further it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union." That language was intended to be of general application, and not limited to unregistered societies which are also trade unions. In *Walker* v. *Sur* (2) Kennedy L.J. took the same view. There an action was brought by an architect for professional services against four named defendants on behalf of all the members of an unincorporated religious society, consisting of some 1800 members. A representation order was refused, but on the ground that the named defendants, not being members of a committee nor trustees of the society, but only four ordinary members selected at random, did not represent the society. Kennedy L.J. said: "Of the body in the present case we know very little on the affidavits before us, and it is not pretended that, as was the case in the *Taff Vale* case (3), there are any funds vested in trustees. It is not alleged that there are any such trustees at all, and the claim is to my mind a claim in which it is sought to make a judgment for payment of money effective against a number of persons who belong to a named society but who have no common fund vested in trustees who could be joined as representing the society." It is obvious that if there had been trustees he would have allowed their joinder as defendants. It was because there were no trustees to join that the representation order was refused.

(1) [1901] A. C. 426, 443. (2) [1914] 2 K. B. 930, 936.
(3) [1901] A. C. 426.

A. W. Cockburn for the respondents. The mere fact that a third person is trustee of property belonging to the defendant in an action is not sufficient reason for adding him as a party. It would not be permissible in an action against husband and wife to join the trustees of the marriage settlement as defendants. The dictum of Lord Lindley in the *Taff Vale* case (1) with respect to adding trustees as parties to an action against an unregistered society was intended to be limited to actions against unregistered trade unions, and not as extending to unregistered societies which, as in the present case, are not trade unions. In *Vacher & Sons* v. *London Society of Compositors* (2) Lord Atkinson clearly so understood it. In *Jarrott* v. *Ackerley* (3) an underlease was granted to an unregistered society which was not a trade union, nor a friendly, industrial, or provident society, but a club of 2000 members. The head lease being forfeited for breach of covenants the society commenced an action against the lessors of the head lease claiming a vesting order vesting the premises in them. The writ was subsequently amended by making three persons who were trustees of the society sue on behalf of all the members. Eve J. held that the trustees had no status to sue. If trustees in such a case cannot sue neither can they be sued.

BANKES L.J. I think the statement of claim in this case as originally framed was open to objection, and that Horridge J. was justified in taking the course which he did. We allowed the pleading to be amended, and in the form in which it now comes before us I think it is impossible to say that it ought to be struck out as disclosing no cause of action or as being frivolous and vexatious in so far as it refers to the six persons named as trustees. The statement of claim alleges that the first eleven defendants are members of the committee of an unregistered association of miners and workmen at Llanbradach, and that the plaintiffs supplied certain films at agreed prices to the order of the committee. As it was originally framed the relief asked was judgment for the amount

(1) [1901] A. C. 426. (2) [1913] A. C. 107, 120.
(3) (1915) 113 L. T. 371.

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IDEAL FILMS, LD. v. RICHARDS.

Bankes L.J.

due as against the eleven defendants personally, instead of a declaration of right as between the plaintiffs and the class whom the named defendants represent. That was not the proper form in which to ask for judgment in a representative action, and though no objection was taken to that portion of the prayer before the learned judge we thought it ought to be amended in that among other particulars, and that matter has now been put right. Then the claim goes on to allege that the remaining six defendants are trustees of the association and that certain property of the association is vested in them. As originally drawn it offended in that it was a claim against those defendants also personally, making them liable for the costs of the action. That is now amended by asking for an order that the trustees should pay the debt claimed together with costs out of the assets of the association in their hands. But even with those amendments Mr. Cockburn contends that the statement of claim is wrong. He says that the proper form is to get a declaratory judgment against the members of the association first, and then by an independent proceeding to ask for the order against the trustees which is asked for in this case in the action. For that contention he relied on certain authorities dealing with claims by or against trade unions. But in my opinion those decisions afford no real guide in the present case, for the rights and liabilities of trade unions are all statutory, while the present case is quite independent of any statutory provision. In my opinion there is no reason why in such a case as the present the plaintiffs should not be entitled to insert this particular form of claim against trustees in a representative action. Lord Lindley's language in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) seems to me to be a direct authority that they are. He is there dealing with the case before him as though the trade union had been unregistered, and he says: "I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves

(1) [1901] A. C. 426, 443.

and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union." That language, I think, he was using not merely with respect to unregistered trade unions, but to unregistered associations of all kinds, and therefore to associations which, like the present defendants, are entirely free from the restrictions of the Trade Union Acts. If that is so it is a direct authority that the plaintiffs are entitled to do what they are seeking to do here. Although, in my opinion, plaintiffs are entitled to do so, I do not mean that they ought to be allowed to exercise that right under all circumstances. If the circumstances are such that the joinder of the trustees in the action would give rise to inconvenience or embarrassment the Court ought to refuse to allow it. In the present case, as no inconvenience is likely to result, I do not think that the joinder should be disallowed.

SCRUTTON L.J. In this case a film company which has let out on hire films to an unregistered society of miners for exhibition in their hall, not having been paid for them, brings an action for the rent. They bring it in the first instance against eleven members of the committee, against whom they have obtained a representation order that they shall represent all the members of the association, and secondly they join as defendants in that writ certain persons who are described as the trustees of the Llanbradach Workmen's Hall and Institute, which is the place where the films were exhibited. As the statement of claim was first drawn it was by no means clear whether the plaintiffs were asking for a personal judgment for the rent against the eleven representative members, or all the members, or against the trustees. It claimed, first, 234*l.* 7*s.* 8*d.*, without saying against whom it was claimed,

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Scrutton L.J.

secondly, an order directing the trustees to pay the said sum to the plaintiffs out of the property and assets of the association in the hands of the trustees, and thirdly, an order charging the said property and assets with payment of the said sum to the plaintiffs, without asking in either of those orders for a direction as to the payment of costs. In those circumstances the trustees took out a summons that they might be dismissed from the action on the ground that their joinder was frivolous and vexatious, or that the writ disclosed no cause of action against them. There is no doubt now that if a plaintiff obtains judgment for a sum of money he may get an order against any property of the defendant the legal estate of which is vested in some third person who is not a party to the action, charging that property in favour of the plaintiff and directing the third person to satisfy the judgment out of it. There was at one time some doubt as to how that was to be done. It was argued that it could not be done in the original action, and that a separate action must be brought against the person who had the legal estate in the property which it was wanted to seize. Two very instructive judgments of Sir George Jessel on this subject will be found in *Anglo-Italian Bank* v. *Davies* (1) and *Salt* v. *Cooper*. (2) He there went fully into the history of the matter and pointed out that the application for equitable execution against property of the debtor, the legal estate in which was in the hands of third persons, might be made by motion either before or after the judgment against the debtor, and he strongly inclined to the view, although it was unnecessary for him in those cases to definitely decide the point, that a separate writ claiming a receiver was not necessary, that is to say that the application for equitable execution might be made in the same action. I do not propose to lay down any general rule, that in all cases in which a money judgment is obtained against persons having an equitable interest in property, execution of the judgment may be enforced against that property by making the trustees defendants in the action; but it is obvious that in many such

(1) (1878) 9 Ch. D. 275, 283. (2) (1880)16 Ch. D. 544

cases it would be convenient that, instead of waiting till after judgment before applying for an order for equitable execution, or bringing an independent action against the trustees for that purpose, the plaintiff should join the trustees as defendants to the original action, provided that he makes it clear that he is making no claim against them personally, either for the money due or for costs, but is only seeking to get at the equitable interest of the principal defendants in property in which the trustees have the legal interest. Where such a joinder is not open to the objection that it is inconvenient or embarrassing it ought to be permitted. The present case seems to me to be of that description. I think that on the facts of this case it would be convenient that these trustees should be present at the trial in order that the judge who deals with the question of a declaration of liability against the members of the association should also deal with the question whether that liability can be enforced against these particular defendants. In the *Taff Vale* case (1) Lord Lindley certainly saw no objection to such trustees being made parties from the outset for the purpose of an order being made on the property which they held as trustees.

Appeal allowed.

Solicitor for the appellants: *H. V. Harraway.*
Solicitors for the respondents: *Martyn & Martyn.*

(1) [1901] A. C. 426, 443.

J. F. C.

1926
Oct. 28.

POINTING *v.* WILSON.

Criminal Law—Assault on Prison Officer—Punishment—Punishment as Protection to Prison Officer—"Protection"—Prison Act, 1898 (61 & 62 *Vict. c.* 41), *s.* 10.

Sect. 10 of the Prison Act, 1898, enacts that "Every prison officer while acting as such shall, by virtue of his appointment, have all the powers, authorities, protection, and privileges of a constable."

Assaults on a constable being more severely punishable by statute than assaults on others:—

Held, that this was for their protection, and, consequently, that a prison officer was entitled to the same protection by virtue of the section, and that there was power to pass the more severe sentence on the appellant, who had assaulted a prison officer.

Case stated by Hampshire Quarter Sessions.

The appellant, Pointing, was a convict in Parkhurst Prison, and on May 15, 1926, he assaulted the respondent, Augustus Wilson, a warder in that prison. For this it was recommended by the visiting justices that he should be flogged, but for medical reasons that recommendation could not be carried out. He was accordingly charged with the assault before a court of summary jurisdiction, and being convicted he was sentenced to six months' imprisonment with hard labour, to be consecutive on his current sentence. The appellant appealed to quarter sessions on the ground that the court of summary jurisdiction had no power to pass a heavier sentence than one of two months' imprisonment with hard labour.

Quarter sessions dismissed the appeal, but stated this case.

Walter E. Lloyd for the appellant. The court of summary jurisdiction had no power to pass a heavier sentence than one of two months' imprisonment with hard labour, under s. 42 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100). But the justices have purported to act under s. 10 of the Prison Act, 1898 (61 & 62 Vict. c. 41), which enacts that "Every prison officer while acting as such shall, by

virtue of his appointment, have all the powers, authorities, protection, and privileges of a constable." And as it is enacted by s. 12 of the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), that an assault on a constable is punishable with a more severe sentence—namely, six months' imprisonment with hard labour, they held that this provision for extra punishment was for the "protection" of a constable, and, consequently, that the respondent was entitled to the same protection by s. 10 of the Act of 1898, and passed the sentence appealed against.

"Protection" in s. 10 of the Act of 1898 refers to the protection of constables from civil actions for acts done by them in the course of their duty, as is that afforded by s. 6 of the Constables Protection Act, 1750 (24 Geo. 2, c. 44). (1) Prison warders do not require the protection suggested, because they are amply protected by the disciplinary powers of the governor of the prison and the visiting justices. The additional term of four months which can be inflicted for an assault on a constable is not for the protection of the constable but for the extra punishment of an offender for a more than usually serious form of assault. In s. 11, sub-s. 1, of the Inebriates Act, 1898 (61 & 62 Vict. c. 60), the "powers, protections and privileges of a constable" are conferred on the officer of a certified inebriate reformatory while engaged in the duty of conveying a person to or from the reformatory or of apprehending and bringing him back to the reformatory, and "protections" can hardly mean protection in the sense contended for by the respondent. Halsbury's Laws of England, vol. ix., para. 1166, note (*h*), p. 576, cites s. 10 of the Act of 1898 as conferring protection on constables killing, etc., prisoners in the execution of their duty, not as protecting constables from attacks made by others on them.

[Archbold's Criminal Pleadings, 26th ed., p. 964, and Stone's Justices' Manual, 58th ed., pp. 337, 343 and 1303, were also referred to.]

H. G. Garland for the Crown was not called upon to argue.

(1) See Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 1, Sch. I.

1926

POINTING v. WILSON.

LORD HEWART C.J. This is a perfectly clear case. The question is whether it was within the power of the court of summary jurisdiction to pass on the appellant a sentence of six months' imprisonment with hard labour. The court of quarter sessions, to whom the appellant appealed, thought it was, and I am of opinion that they were right. It was not disputed that if the respondent had been a constable at the time of the assault, the appellant would be liable to this sentence, but the argument was that the provision which would authorize the sentence in that case does not apply in the case of an assault on a prison warder while in the execution of his duty. But s. 10 of the Prison Act, 1898, says that "Every prison officer while acting as such shall, by virtue of his appointment, have all the powers, authorities, protection, and privileges of a constable." The argument for the appellant seems to me to depend on two errors, first, the error of thinking that the whole of the section applies to a warder except the word "protection," and, secondly, that of putting an extremely narrow construction on that word. It really involves the desperate proposition that it is true to say that people are not protected from assault by the infliction of punishment. In my opinion this section clearly puts prison officers on the same footing with constables so far as the measure of punishment for assaults upon them is concerned. I think that the case for the appellant is unarguable, and that this appeal should be dismissed.

AVORY J. I agree.

SALTER J. I agree.

Appeal dismissed.

Solicitors for appellant: *Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Newport, Isle of Wight.*

Solicitor for respondent: *Director of Public Prosecutions.*

W. L. L. B.

SWAYNE, Appellant *v.* HOWELLS and Another, Respondents.

1926
Oct. 18, 19, 29.

Rating—Right of Sporting—Right of Fishing—Licence to fish—Severance from Occupation of Land—No Grant of fishing Rights by Deed—"Let"—"Owner of the Right of Sporting"—Liability of Person licensed to fish to pay Rates—Rating Act, 1874 (37 & 38 *Vict. c.* 54), *ss.* 3, 6.

By s. 3 of the Rating Act, 1874, rights of sporting, which include rights of fishing, when severed from the occupation of land, are brought within the category of rateable hereditaments.

The persons upon whom the liability to pay rates in respect of sporting rights falls are prescribed in s. 6.

Sub-s. 1 of s. 6 deals with a case where the owner of land has let the land reserving to himself the right of sporting, in which case the right of sporting is not to be separately rated.

Sub-s. 2: "Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof . . . . may be rated as the occupier thereof."

Sub-s. 3: "Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof."

Sub-s. 4: "For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right."

The appellant, by payment of an annual sum, obtained the exclusive right to fish in certain waters, and the right so to do was obtained each year from eight different owners or occupiers each in respect of a separate holding. There was no deed or grant to the appellant of the said fishing rights. The appellant was assessed in one assessment in respect of the fishing. He refused to pay the rates on the ground that he was not the person liable to pay, and a distress warrant was issued against him:—

Held, that a person who has only a licence to fish is not the owner of the right of sporting within the meaning of s. 6 of the Rating Act, 1874. The Legislature must be deemed to have provided that in the absence of a lease the landlord should be deemed to be the occupier of sporting rights.

Further, as there was no grant by deed of the right of fishing there was in law no severance from the occupation of the land, and therefore the appellant was not liable to be rated.

Case stated by Herefordshire justices.

A complaint was preferred by the respondents, Aaron Howells and Thomas Williams, the overseers of the parish or township of Longtown in the county of Hereford, under the

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Rating Act, 1874, against the appellant, George Champeny Swayne, for that he being a person duly rated and assessed to the relief of the poor of the said parish or township in the several sums following, that is to say :—

	£	s.	d.
A rate made on November 19, 1924, in the sum of	14	12	6
A rate made on May 20, 1925, in the sum of	18	8	8
A rate made on November 16, 1925, in the sum of 16*l.* 11*s.* 4*d.*, the first instalment of which was already due and payable, namely	8	5	8
	£41	6	10

had not paid the several instalments by which the said rates were respectively declared by the respondents to be payable, or any part thereof, but had refused so to do.

The complaint was heard on February 1, 1926, and on February 15, 1926, the court of summary jurisdiction made an order that a distress warrant issue against the appellant.

The appellant being dissatisfied with the said determination applied to the justices to state a case for the opinion of the High Court, and the justices accordingly stated the following case :—

(*a*) The rates in question were levied in respect of certain alleged fishing rights enjoyed by the appellant in and over the rivers Monnow and Eskley in the parish or township of Longtown. It was admitted that (subject to the objections that there was no right in the respondents to rate the appellant and that his name was wrongly placed on the rate book) the rates in question had been duly made, published and demanded, and were unpaid, and that if any sum was due from the appellant in respect of such rates the total amount thereof as hereinbefore set out was 41*l.* 6*s.* 10*d.*

(*b*) The appellant had by payment of an annual sum obtained exclusive right to fish and had fished over the said rivers for a considerable number of years between the Grove Farm at the head of the Eskley brook down to Glandwr

Farm, and the right so to do was obtained each year from eight different owners or occupiers each in respect of a separate holding making up the whole. Prior to November 19, 1924, neither the respondents nor their predecessors had rated the appellant in respect of the said fishing.

(*c*) The appellant paid as aforesaid an annual sum to each of the said owners or occupiers for the fishing which he enjoyed, and in one year the total came to over 106*l*., for which payment the appellant obtained as aforesaid the exclusive right of fishing over the said rivers as aforesaid. The appellant exercised the right of fishing in each case during the times covered by the rates in question.

(*d*) In July, 1925, the appellant gave up the fishing of two of such owners or occupiers—namely, Ellis and Johnson, and such fishing was let thereafter to somebody else.

(*e*) The appellant was assessed in one assessment in respect of the fishing so obtained by him from the owners or occupiers.

(*f*) The appellant appealed to the assessment committee against the said assessment on the grounds that he was not the person liable to pay and that the fishing was extravagantly rated. The said assessment was however confirmed.

(*g*) There was no deed or grant to the appellant of the said fishing rights.

On the part of the appellant it was contended :—

(1.) That he had a licence only to fish, and as a licensee was not rateable in respect of fishing rights.

(2.) That the right of fishing, being an incorporeal hereditament lying in grant, must be transferred by deed, and in the absence of such a deed no such right was at any material time vested in the appellant.

(3.) That there had been no severance of the fishing rights, and that therefore there was no rateable hereditament upon which a rate could be levied.

(4.) That the rates in question were not lawfully made on the appellant and were without authority.

On the part of the respondents it was contended :—

(1.) That no legal severance was required under the Rating Act, 1874, and that the respondents were entitled to

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recover the rates either from the occupier or owner of the right.

(2.) That sporting rights are rateable when severed from the occupation of the land, and that the term "severed from the occupation of the land" does not contemplate a legal severance but an occupation of the land by one person and the occupation of the sporting rights by another person.

(3.) That the appellant could lawfully be rated if he was in beneficial occupation of the said fishing rights.

(4.) That the appellant was in beneficial occupation of the said fishing rights.

The attention of the justices was directed to the following cases: *Duke of Somerset* v. *Fogwell* (1); *Bird* v. *Higginson* (2); *Kenrick* v. *Guilsfield Overseers* (3); *Eyton* v. *Mold Overseers*. (4)

The justices found as a fact that the appellant enjoyed the beneficial occupation of the fishing in respect of which the rates were made and in which he had the exclusive right during the periods over which the said rates extended, and they decided that the appellant was liable to be separately rated in respect of the said fishing rights and that the said rates were properly due from him. They therefore made an order that a distress warrant issue.

The question for the opinion of the Court was whether upon the above statements and finding the justices came to a correct determination and decision in point of law.

Croom-Johnson for the appellant. The decision of the justices was wrong. Prior to the passing of the Rating Act, 1874, rights of sporting, which include the right of fishing, when severed from the occupation of the land, were not rateable, because they were incorporeal rights in gross: see *Hilton Overseers* v. *Bowes Overseers* (5), and as such were not within the statute of Elizabeth (43 Eliz. c. 2), and the occupier of the land was held not to be rateable for the sporting rights, because they did not form part of the value of his occupation.

(1) (1826) 5 B. & C. 875.
(2) (1835) 2 Ad. & E. 696; (1837) 6 Ad. & E. 824.
(3) (1879) 5 C. P. D. 41.
(4) (1880) 6 Q. B. D. 13.
(5) (1866) L. R. 1 Q. B. 359, 369.

It was, however, held in *Reg.* v. *Battle Union* (1) that an owner of land who kept it in his own occupation but let the right of shooting was himself rateable for the full value of the land as enhanced by the right of shooting, because he received as an incident of his occupation the rent for the shooting. In *Reg.* v. *Thurlstone* (*Inhabitants*) (2) it was held that a tenant of land, the right of shooting over which was reserved to the landlord, was rateable for the land as diminished in value by the reservation of the right of shooting. It was also held in *Reg.* v. *Williams* (3) that a tenant who had taken a farm without the right of shooting over it, and had afterwards taken the shooting under a separate agreement, was rateable for the full value of the farm as enhanced by the right of shooting, notwithstanding that the right of shooting and the occupation were vested in him under different titles. The Rating Act, 1874, was intended to meet the difficulty with regard to incorporeal hereditaments, such as rights of sporting, and to make them rateable when severed from the occupation of the land. It provided in s. 3 that the Poor Rate Acts should extend to certain hereditaments as if they had been mentioned in the statute of Elizabeth. The hereditaments were: (1.) land used for plantation; (2.) rights of sporting, including right of fishing (see s. 6); and (3.) mines. Sect. 6 deals with the valuation and rating of rights of sporting. Sub-s. 1 of that section deals with the case where the owner of land has let the land but reserves to himself the right of sporting, in which case the right of sporting is not to be separately rated. Sub-s. 2 deals with a case where the right of sporting is severed from the occupation of the land and is let on lease, in which case either the owner or the lessee may be rated as the occupier thereof. Under sub-s. 3 "the owner of any right of sporting, when severed from the occupation of land, may be rated as the occupier thereof." The word "severed" in that Act means that the right is legally severed from the occupation of the land in the only way in which the right can be severed in law—

(1) (1866) L. R. 2 Q. B. 8.
(2) (1859) 28 L. J. (M. C.) 106.
(3) (1854) 23 L. T. (O. S.) 76; 2 W. R. 410.

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namely, by a deed. It was held in *Duke of Somerset* v. *Fogwell* (1) that a several fishery is an incorporeal hereditament and that a term for years could not be created in it without a deed. In *Bird* v. *Higginson* (2) it was held that an agreement to let a right of fishing was an agreement for the conveyance of an incorporeal hereditament and ought, therefore, to have been under seal. The appellant is neither the owner nor the lessee of a right of sporting which is severed from the occupation of land and is let within sub-s. 2 of s. 6 of the Rating Act, 1874, because he is not the person entitled to receive the rent for the same, and secondly because there is no lease. The appellant has merely a licence to fish, either by parol or by a letter, and as such is not rateable in respect of the fishing rights. There cannot be an occupation of an abstract thing like a right of fishing. In *Kenrick* v. *Guilsfield Overseers* (3) the grant of the sporting rights was by deed, and therefore the point that comes up for decision in the present case did not arise. It was held in that case that there was a severance of the sporting rights from the occupation of the land and that the lessee might be rated in respect of the sporting rights. In *Eyton* v. *Mold Overseers* (4) the appellant was the owner and occupier of certain woodlands over which he exercised the right of sporting, and it was held that the right of sporting was properly taken into account in estimating the rateable value of the land.

Blanco White for the respondents. If sporting rights are not severed from the occupation of the land the land is rated at one fourth of its full annual value, but if sporting rights are severed from the occupation of the land, and are let, they are rated at their net annual value: see *Alton Urban Council* v. *Spicer* (5), where Lord Alverstone C.J. speaks of the person to whom the sporting rights are let as being "the occupier of a special statutory hereditament, which was created and made rateable by the Rating Act,

(1) 5 B. & C. 875.
(2) 2 Ad. & E. 696.
(3) 5 C. P. D. 41.
(4) 6 Q. B. D. 13.
(5) (1904) 73 L. J. (K. B.) 280, 281.

1874." In *Holford* v. *Pritchard* (1) the plaintiff had by an agreement in writing let to the defendant at a yearly rent the right of fishing. The defendant having used the fishery the plaintiff sued to recover the rent under a count for use and occupation. The objection was taken that the action could not be maintained since it was the grant of an incorporeal hereditament which would not pass except by deed; or, if not, it was a personal licence to fish in respect of which no action for use and occupation would lie. The objection was overruled. On a motion to enter a nonsuit Parke B. said: "This agreement gives the defendant the right to occupy part of the fishery," and the rule was refused. In *Rex* v. *Ellis* (2) the lessee of certain fishings in the River Severn was held liable to be rated to the poor in respect of such fishery. In the present case the appellant was given the exclusive licence by parol to fish. It is true that there was no demise of the right to fish at common law, but correspondence had passed between the appellant and the owners or occupiers of the land which would amount to a demise in equity which could be enforced by specific performance. The appellant is the occupier of the fishery and is the equitable owner, although not the legal owner thereof. This is sufficient to comply with the requirements of the statute. It was contended that the word "severed" as used in the Act is a term of art, but my submission is that it is used in the Act in its natural sense, and that it is sufficient if there is a severance in fact of the right of fishing from the land. The Court in *Reg.* v. *Thurlstone* (*Inhabitants*) (3) spoke of the right of shooting being separated from the beneficial occupation of the tenant. "Severed" means the same as "separated," and there is no reason for limiting the meaning of the word and saying that it is limited to severance by deed. It is sufficient if there is a severance in fact of the right of fishing from the occupation of the land, and if there is in fact a letting of the right. In the present case the right was in fact severed from the

(1) (1849) 3 Ex. 793.
(2) (1813) 1 M. & S. 652.
(3) 1 E. & E. 502; 28 L. J. (M. C.) 106.

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occupation of the land, and was let to the appellant, who was in beneficial occupation and who is therefore liable to be rated in respect thereof.

Croom-Johnson replied.

Cur. adv. vult.

Oct. 29. The judgment of the Court (LORD HEWART C.J., AVORY and SALTER JJ.) was read by

LORD HEWART C.J. By s. 3 of the Rating Act, 1874, rights of sporting, which include rights of fishing, when severed from the occupation of the land were brought within the category of rateable hereditaments, and if the Act had contained no further provision with respect to them, the liability to be rated would have fallen upon the person in beneficial occupation or enjoyment of the right. But in our view s. 6 of the Act must be read as prescribing the persons upon whom this liability is to fall, and unless the appellant is shown to be a person liable under that section he is, we think, entitled to succeed on this appeal. Sub-s. 1 of that section applies to a case where the owner of the land has let the land, reserving to himself the right of sporting: vide *Rogers* v. *St. Germans Union*. (1) In that case the right of sporting is not to be separately rated. Sub-s. 2 appears to apply only to a case where the sporting right is let on lease, and therefore has no application to the present case.

The question remains whether the appellant can be said to be "the owner of the right of sporting" within the meaning of sub-s. 3 construed in the light of sub-s. 4. It is difficult to suppose that the word "let" in sub-s. 4 was intended to be construed in a different or wider sense as compared with the sense in which the same word is used in sub-s. 2, but in either view, looking at the latter part of sub-s. 4, we do not think a person who has only a licence to fish is contemplated as owner of the right of sporting within the meaning of s. 6. The Legislature must, we think, be taken to have known when this Act was passed that these sporting rights are frequently let for the season only, and therefore made

(1) (1876) 40 J. P. 807.

special provisions that in the absence of a lease the landlord should be deemed to be the occupier.

It was further contended on behalf of the appellant that there being in this case no grant by deed of the fishing rights there was in law no severance from the occupation of the land. The cases of *Rogers* v. *St. Germans Union* (1) and *Brigstocke* v. *Rayner* (2) appear to support this view, but in any case for the reasons given we are of opinion that the appellant was not rateable, and that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Darley, Cumberland & Co., for A. Jefferay Mawer, Wells.*

Solicitors for respondents: *E. F. & H. Landon, for John Moore, Hereford.*

R. F. S.

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[1926. L. 744.]

Factor—Mercantile Agent—Possession of Goods—Consent of Owner—Property in Goods—Fraud of Agent—Bona fide Purchaser—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.

The plaintiff, wishing to sell furniture together with certain tapestry known as the "Aubusson" tapestry, stored it in a house and engaged one Prior, an art dealer who had an antique shop near by, to sell it for him on commission. Prior lived in the house and brought customers to see the tapestry. Customers dealt with Prior only and knew nothing of the plaintiff, but Prior had no authority to complete a sale without plaintiff's sanction. Prior falsely represented to the plaintiff that he had sold the tapestry to one W. for 525*l.* and so obtained plaintiff's consent to the removal of the tapestry for sale and delivery to W. Prior then sold it to defendant in fraud of the plaintiff for 250*l.* The defendant acted in good faith in the usual course of business, and had no notice of the plaintiff's title:—

Held, that Prior was a mercantile agent and not a mere servant or shopman; that a mercantile agency under the Factors Act, 1889, may

(1) 40 J. P. 807. (2) (1875) 40 J. P. 245.

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exist although the agent, as here, is acting for one principal only and has no general occupation as agent; that Prior was not in possession of the tapestry in virtue of his residence in the house, but that he came into possession of it as mercantile agent, when he was allowed to take it away under colour of the alleged sale to W., even though the plaintiff's sanction was obtained by fraud; that the sale to the defendant took place in the ordinary course of Prior's business as a mercantile agent within the meaning of the Factors Act, 1889, and that the defendant was therefore not liable for conversion.

ACTION tried by Wright J. without a jury.

The following statement of facts is taken from the judgment of Wright J.:—

"This is an action brought by the plaintiff, Colonel Claude Lowther, to recover damages from the defendant, Lionel Harris, carrying on business as an art dealer under the name of the Spanish Art Gallery. The claim is pleaded in the alternative as for detinue or conversion, but the plaintiff's counsel elected to proceed as for conversion. The subject-matter consisted of two pieces of tapestry, one consisting of three panels, described as Aubusson tapestry, and the other a single piece, described as the Leopard tapestry (also as a hunting scene). The defendant relied on the Factors Act, 1889, or, in the alternative, on estoppel at common law. The circumstances in regard to the two pieces were in some respects different.

Colonel Lowther early in 1923 had a large quantity of valuable furniture and antiques for disposal. He had as secretary a Mr. Urwin. In March, 1923, he went into an antique shop in Ebury Street where one Barton Prior dealt in antiques in a small way, principally glass and china. The plaintiff made some purchases, and after some conversations came to an arrangement with Barton Prior that Prior should act as his agent for the disposal of the furniture and antiques. Among the articles so to be dealt with were the Aubusson tapestry, which had been bought in 1919 for 900*l.*, and the Leopard tapestry, which about the same time had cost 771*l.* The plaintiff took a house, 10 Palace Street, a few minutes' distant from Prior's shops in Ebury Street, and there the plaintiff's furniture and antiques were stored. Mr. Urwin

was the lessee, but this was in his capacity as agent for the plaintiff, and he had an office on the first floor. Prior was allowed to live in a flat on the top floor and to use as a sitting room a room on the floor below. He retained his business in Ebury Street, where he had two shops at Nos. 5 and 9, and his business was registered under the Registration of Business Names Act, 1916, as 'Period.' Towards the end of 1923 he also had a telephone address at 10 Palace Street, under the name 'Period,' with an extension to Ebury Street, but that was a private telephone of his own. Customers used to come to his shops in Ebury Street and he used to bring them round to see the furniture on view as for sale at 10 Palace Street, and in most, if not all, cases customers were not told that the furniture was the property of the plaintiff, or that Prior was merely selling on the plaintiff's behalf. He was left to make out invoices for goods sold as for 'Period,' 5 and 9 Ebury Street, and he collected the price by cheques made to himself; he accounted to the plaintiff by paying cash, at least during the time material to this case. As between the plaintiff and Prior, the plaintiff's authority was strictly limited. The books were kept by Mr. Urwin, who was in the office at 10 Palace Street during business hours. Prior had no authority to complete a sale or make a delivery without first getting the sanction of the plaintiff, whom he used to see about four times a week, or, if the articles were of less value than 100*l*., the sanction of Mr. Urwin. Prior had no authority to remove any goods from 10 Palace Street without such sanction. Trouble began about the middle of 1924, or a little earlier in that year, between Prior and the plaintiff, who complained that money for goods sold was not coming in properly. Alterations in procedure were discussed, and in August, 1924, heads of agreement for the protection of the plaintiff as against Prior were signed. A little later, in October, 1924, it was discovered that various articles of value had been disposed of by Prior. He was arrested and was tried and convicted of larceny at the Central Criminal Court. As a result of what was discovered by the plaintiff, this action was brought in respect

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of two of the articles which Prior had dishonestly made away with.

I find the following facts with reference to the Aubusson tapestry. Prior falsely pretended to the plaintiff about August, 1923, that he was able to sell this tapestry to one Corbel Woodhall for 525*l.*; the plaintiff, after protesting that the price was too small, agreed to the sale on the representation that Woodhall was a valuable customer. After this consent, given in the presence of Mr. Urwin, the latter permitted Prior to remove the tapestry in order to make delivery and complete the sale as authorized by the plaintiff. This happened in August, 1923; I think the entry in the plaintiff's book as of December, 1923, was direct bad book-keeping. In fact, Prior had not sold the tapestry to Woodhall at all, and his story was a mere fiction in order to enable him to get possession of the tapestry, which he did, with the intention of disposing of it in fraud of the plaintiff. Having thus got the tapestry, he sent it in a van or cart by means of his brother, William Prior, who was merely acting on his instructions, to the defendant's place of business and offered it for sale. The tapestry had actually been offered to the defendant about a month before in the same way for 300*l.* The defendant had had some small dealings with Prior a little previously, and offered 250*l.* for the tapestry. The defendant and his son recognized the tapestry as having been offered by the plaintiff at Christie's in the preceding March, and on inquiry were told by William Prior that it was being sold on behalf of the plaintiff. They knew nothing of Barton Prior's general connection with the plaintiff or of the premises at 10 Palace Street. They dealt with Prior as a commission agent carrying on business under the name of 'Period,' at 5 and 9 Ebury Street, and when the price was agreed at 250*l.* they gave their cheque for that sum to Barton Prior, obtaining a receipt signed B. Prior on paper headed 'Period, 5 and 9 Ebury Street,' and took the tapestry. A few days later they sold it to Simmons, of New York, for 350*l.*, which I find to be its true value at that time. In January, 1924, the same man, W. Prior, came again with the other

piece of tapestry, the Leopard tapestry, on a van and offered it for sale. The defendant bought it for 200*l.*, paid a cheque in favour of B. Prior, and took a receipt headed 'Period, 5 and 9 Ebury Street,' and signed by William Prior for Barton Prior. The defendant did not know or question whether Prior was selling for himself or for a principal, nor had he any knowledge that the tapestry was the property of the plaintiff. In fact, Prior had simply stolen the tapestry from 10 Palace Street, without the knowledge or consent of the plaintiff or Mr. Urwin, who thought that it was still lying folded upon a shelf. It was not till October, 1924, that the theft was discovered along with the other frauds. The defendant sold the tapestry to Cardinal and Harford almost at once for 300*l.*, less commission. I place its value at that date at 270*l.* No suggestion is made that the defendant acted otherwise than in good faith. I find that it was in the usual course of business in fine art dealings for a dealer, whether acting for himself or as agent for a principal, to bring for sale to other dealers articles which, if sufficiently bulky, would be carried in a van or motor car."

Stuart Bevan K.C. and *van den Berg* for the plaintiff.

Greaves-Lord K.C. and *L. W. J. Costello* for the defendant.

[The arguments sufficiently appear from the judgment.]

Cur. adv. vult.

Nov. 4. WRIGHT J. read the judgment, which after the above statement and findings of fact, continued: Unless the defendant has a defence under the Factors Act, 1889, or on the ground of common law estoppel, it is clear that he is liable in damages for conversion, which damages, if recoverable by the plaintiff, I fix at 350*l.* in the case of the Aubusson tapestry, and at 270*l.* in the case of the Leopard tapestry. The circumstances relating to the two pieces of tapestry are different and require separate consideration. I shall first deal with the Aubusson tapestry, and shall first consider the defence based on the Factors Act, 1889, in order to ascertain if the conditions of the Act are fulfilled. The

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first question is whether Prior was a mercantile agent—that is, an agent doing a business in buying or selling, or both, having in the customary course of his business such authority to sell goods. I hold that he was. Various objections have been raised. It was contended that Prior was a mere servant or shopman, and had no independent status such as is essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shopman: *Cole* v. *North Western Bank* (1); *Lamb* v. *Attenborough* (2); *Heyman* v. *Flewker*. (3) I think this is still law under the present Act. In my opinion Prior, who had his own shops, and who gave receipts and took cheques in his own registered business name and earned commissions, was not a mere servant but an agent, even though his discretionary authority was limited. It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and that the Factors Act, 1889, requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Heyman* v. *Flewker* (3), and I think the same is the law under the present Act. In *Weiner* v. *Harris* (4) it appears that the agent was not acting for any other principal than the plaintiff, and this was so also in *Hastings, Ld.* v. *Pearson* (5), in respect of which case the Court of Appeal, in *Weiner* v. *Harris* (4), held that the agent was a mercantile agent. It is also clear that pictures, as objects of purchase and sale, constitute those who deal in them on commission mercantile agents within the Factors Acts: see under the old Act *Heyman* v. *Flewker* (3) and under the present Act *Turner* v. *Sampson*. (6)

The next question is whether Prior was in possession of the Aubusson tapestry, and, if so, with the consent of the plaintiff, and, if he had such possession, whether it was in his capacity as mercantile agent. I add the last consideration because I think that, just as such a condition was

(1) (1875) L. R. 10 C. P. 354, 372.
(2) (1862) 1 B. & S. 831.
(3) (1863) 13 C. B. (N. S.) 519.
(4) [1910] 1 K. B. 285.
(5) [1893] 1 Q. B. 62.
(6) (1911) 27 Times L. R. 200.

imported in the old Factors Acts (see *Cole* v. *North Western Bank* (1) and cases there cited), the same condition must be satisfied under the Factors Act of 1889. For the defendant it was contended that the tapestry, while lying at 10 Palace Street, was in the possession of Prior, relying on the facts that Prior had the use for residence of the top floor and the sitting room below, and further that he had disposing control over the goods in the house. As to Prior's residence in the house, I hold that the furniture in it, including the tapestry, was in the possession of the plaintiff, because Mr. Urwin, who was the lessee and occupier of the house, and who was in attendance during business hours, was merely a servant of the plaintiff, so that his possession was the plaintiff's possession. I adopt the language of Pollock and Wright on Possession, p. 38: "It will hardly be denied that a man is in possession in fact, as well as possessor in law, of his own goods in the house which he occupies, whether he be in the room at a given moment, or even in the house, or not." The plaintiff did all in his power to exclude any unauthorized dealing with the goods by Prior while they were in the house. As to Prior's use of the top floor and sitting room, I think Prior was merely in the position of a licensee, and perhaps caretaker, but never in possession of the plaintiff's goods in 10 Palace Street. Counsel for the defendant also contended that Prior had possession of the goods because he was in a position to dispose of them by a sale enforceable by specific performance. Assuming that he was able to do so, though as I find he was forbidden to sell without specific authority, possession would not thereby be established, any more than if the goods had been in an independent warehouse. But I do hold that Prior became in possession of the Aubusson tapestry when he was allowed to take it away in the van after the plaintiff had sanctioned a sale to Woodhall. It is true that no such sale had in fact been made or was intended to be made, and that the possession was obtained by the fraud of Prior. Possession, however, was in fact obtained by Prior, and obtained by him in his capacity as mercantile agent. For

(1) (1875) L. R. 10 C. P. 354, 372.

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the plaintiff it was contended that Prior obtained the tapestry under colour of an actually completed sale, and merely for purpose of delivery and as a sort of carrier between vendor and vendee. I think that is erroneous. Prior's functions as a mercantile agent were not completed even if a bargain had been concluded, but extended to the delivery of the goods, the collecting of the price, and the giving of a receipt and a subsequent accounting to the plaintiff. Delivery of possession to Prior was a necessary step to enable him to complete his office. The same point was raised under the old Acts in *Baines* v. *Swainson* (1) and in *Vickers* v. *Hertz* (2), referred to in *Cole* v. *North Western Bank* (3), in which case it was held that possession given to the agent in similar circumstances was possession given to him in his capacity as a mercantile agent. I think that is still the law. But it must further be determined if the possession was obtained with the consent of the plaintiff. It is not necessary here to rely on the presumption expressed in the Factors Act, 1889, s. 2, sub-s. 4, because I hold that the plaintiff did consent to the possession. It is true that the consent was obtained by fraud, and that in any event the plaintiff's sanction to Prior's selling was limited to a selling at a definite price and to a definite purchaser, and for the plaintiff reliance was placed on certain observations of Wills J. in *Biggs* v. *Evans* (4), stated to be to the effect that there was no intrusting for sale within the old Factors Acts, because the principal gave only a partial or limited authority to sell. If that were the effect of that judgment, it would seem inconsistent with the principles laid down in the cases relating to the old Factors Acts and would clearly be contrary to the language and purpose of the Factors Act, 1889, and to the cases decided under it. But it is said that there was no consent in law, because Prior obtained the tapestry under circumstances which rendered him guilty of larceny by a trick. I do not think he was guilty of that offence. When Prior obtained possession of

(1) (1863) 4 B. & S. 270.
(2) (1871) L. R. 2 H. L. Sc. 113.
(3) L. R. 10 C. P. 354, 374.
(4) [1894] 1 Q. B. 88.

the tapestry, the plaintiff intended not merely to part with possession but also to confer a power to pass the property; it is clear that in such a case the misappropriation is either larceny by a bailee or obtaining goods by false pretences on the principles explained in *Whitehorn Bros.* v. *Davison* (1) and *Folkes* v. *King.* (2) But a fraud of that character, such as not to amount to larceny by a trick, does not vitiate the consent of the owner to the agent's possession. Whether even larceny by a trick can, consistently with the policy and purpose of the Factors Act, 1889, which was passed to protect innocent purchasers for value, be held to vitiate consent in fact given and intended by the principal remains the subject of two conflicting decisions of the Court of Appeal —namely, *Oppenheimer* v. *Frazer* (3) and *Folkes* v. *King.* (2) I do not, on my view of the facts, consider that the particular question arises in this case.

I accordingly hold that Prior obtained possession of the Aubusson tapestry in his capacity as a mercantile agent and with the consent of the plaintiff; having such possession, he made (as I have found above), in the ordinary course of business of a mercantile agent, a sale to the defendant, who, it is not contested, acted in good faith and with no notice of Prior's want of authority. I hold that the defendant establishes his defence as regards the Aubusson tapestry under the Factors Act, 1889. This conclusion renders it unnecessary to discuss the plea based on estoppel at common law. I merely observe that on the facts established the defendant had no notice of the actual relations between the plaintiff and Prior, or how as between them business was conducted, and knew nothing except that the tapestry belonged to the plaintiff, and that Prior, whom the defendant regarded as a commission dealer, stated he was selling it on behalf of the plaintiff.

[His Lordship then dealt with the sale of the Leopard tapestry, and held that as to this the defence under the Factors Act, 1889, failed, because Prior never had possession

(1) [1911] 1 K. B. 463. (2) [1923] 1 K. B. 282.
(3) [1907] 2 K. B. 50.

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of it with the consent of the plaintiff, and therefore the conditions of the Act were not fulfilled. He held that as to this tapestry the plaintiff was entitled to recover.]

Solicitors for plaintiff: *Windybank, Samuell & Lawrence.*
Solicitors for defendant: *Powell, Rogers & Merrick.*

F. P. F.

K. B. D.
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April 20, 27.
C. A.
July 21.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

HARNETT *v.* FISHER.

Limitations, Statute of—Negligent Certification of Person as Lunatic—Reception Order—Claim for Damages—Finding that Person not a Lunatic—Action commenced more than Six Years after Reception Order—Disability—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *ss.* 3, 7—*Costs—Separate Issues—Successful Party—Duty of trial Judge.*

In 1912 the defendant gave a certificate under s. 4 of the Lunacy Act, 1890, that the plaintiff was of unsound mind, and on the same day a reception order was made by a justice under which the plaintiff was detained. The plaintiff escaped from detention in 1921, and to an action brought in 1922 by him against the defendant claiming damages for the negligent giving of the certificate, the defendant pleaded (inter alia) that the action was barred by s. 3 of the Limitation Act, 1623. The plaintiff claimed that he was entitled to the protection of s. 7 of that Act, as a person non compos mentis. At the trial the jury found that in 1912 the plaintiff was not of unsound mind, and that the defendant in giving the certificate did not act with reasonable care:—

Held, by Horridge J., (1.) that a medical man who undertakes the statutory duty of giving a certificate under s. 4 of the Lunacy Act, 1890, must use reasonable care, and if he fails to do so he is liable for the damage caused to the person in respect of whom he gave the certificate; (2.) that the negligent giving of the certificate was a direct cause of the reception order and the detention of the plaintiff; but (3.) that the action was barred by s. 3 of the Limitation Act, 1623, as in view of the jury's finding that the plaintiff was not of unsound mind he could not claim to come within the protection of s. 7 of the Act of 1623 as a person non compos mentis, although for certain purposes a person detained under a reception order was referred to as a lunatic in the Lunacy Act, 1890.

Held, by the Court of Appeal, that while s. 7 of the Limitation Act, 1623, extended to actions on the case, it must be construed literally, and that detention under a receiving order did not put the plaintiff in

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the position of a lunatic so found, so as to entitle him to claim disability as a person non compos mentis within s. 7; and that therefore his remedy by action on the case was barred by s. 3.

Decision of Horridge J. affirmed.

Piggott v. *Rush* (1836) 4 Ad. & E. 912 approved.

It is the duty of the trial judge, if he intends that the costs of an action shall be borne distributively, to give express directions at the trial that the plaintiff or defendant shall be allowed the costs of those issues on which he has succeeded.

Bush v. *Rogers* [1915] 1 K. B. 707 approved.

FURTHER consideration by Horridge J. of an action tried with a special jury.

The plaintiff sued the defendant, a medical man, claiming damages for negligence in certifying the plaintiff to be a lunatic and a proper person to be taken charge of and detained under care and treatment.

On November 10, 1912, the defendant and another medical man, since deceased, each gave a certificate under s. 4, sub-s. 2, of the Lunacy Act, 1890, that the plaintiff was a lunatic, and on the same date a reception order was made by a justice, under which the plaintiff was detained.

The plaintiff remained in detention in various asylums until October 15, 1921, when he succeeded in making his escape. He issued the writ in the present action on May 31, 1922.

By his defence, the defendant said that he acted in good faith, with reasonable care, and he relied on s. 330, sub-s. 1, of the Lunacy Act, 1890; he further contended that the plaintiff's alleged right of action did not accrue within six years next before the commencement of the action, and the action was therefore barred by s. 3 of the Limitation Act, 1623 (21 Jac. 1, c. 16).

At the trial the jury found that on November 10, 1912, the plaintiff was not of unsound mind, that the defendant did not act with reasonable care, and they assessed the damages at 500*l*.

Neilson K.C. and *Carthew* for the defendant. In view of the finding of the jury that on November 12, 1912, the plaintiff was not of unsound mind, this action, which was

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not commenced till 1922—more than six years after the cause of action arose—is barred by s. 3 of the Limitation Act, 1623, and the plaintiff is not entitled to the protection of s. 7 of that Act (1) as a person non compos mentis. It is not admitted that actions on the case such as this, which is an action for breach of duty, are within s. 7 at all, but even assuming that they are the plaintiff is clearly not entitled to the benefit of it.

[HORRIDGE J. May it not be said that the plaintiff was imprisoned ?]

The disability of imprisonment was abolished by s. 10 of the Mercantile Law Amendment Act, 1856.

Secondly, apart from the point under the Limitation Act, 1623, the defendant is entitled to judgment, inasmuch as his act in signing the medical certificate was not the direct cause of the plaintiff's detention, the independent act of the justice intervening and being the effective cause of the detention : per Lord Reading C.J. and per Scrutton L.J. in *Everett* v. *Griffiths* (2) ; *Thompson* v. *Schmidt.* (3) The decision of the justice was a judicial act : *Hodson* v. *Pare* (4) ; *Lock* v. *Ashton* (5) ; and he had complete power to do what he chose on the evidence before him. There was no obligation upon him to act upon the medical certificate ; he was entitled to make such further inquiries as he saw fit : see per Lord Atkinson in *Everett* v. *Griffiths.* (6)

Cremlyn and *Macaskie* for the plaintiff. Sect. 7 of the

(1) Limitation Act, 1623, s. 7 : " Provided, nevertheless, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of account, actions of debts, action of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

(2) [1920] 3 K. B. 163, 169, 192.

(3) (1891) 56 J. P. 212.

(4) [1899] 1 Q. B. 455.

(5) (1848) 12 Q. B. 871.

(6) [1921] 1 A. C. 631, 691, 692.

Limitation Act, 1623, is co-extensive with s. 3, and the actions mentioned in s. 7 are mere illustrations of the kind of actions coming within the scope of the Act. All actions on the case are within the equity of s. 7 : *Chandler* v. *Vilett* (1) ; *Crosier* v. *Tomlinson* (2) ; *Piggott* v. *Rush.* (3) The plaintiff is entitled to invoke the protection of that section as having been non compos mentis, and indeed it is not open to the defendant, in view of the certificate he gave, to say otherwise. The moment the plaintiff was put in the asylum his status was changed, and he must be treated while so detained as de facto insane. The certificate has to show that in the opinion of the medical man by person certified is of unsound mind : see Lunacy Act 1890, Sch. I., form 8. Further, s. 35, sub-s. 1, of the same Act speaks of the person in respect of whom a reception order is made as "the lunatic"—as distinguished from "the alleged lunatic" in s. 6, sub-s. 1, and s. 50 speaks of a person "detained as a lunatic." Accordingly the plaintiff, who was detained as a lunatic, must be treated as having been a person non compos mentis within s. 7 of the Act of 1623.

The defendant failed in the duty he owed to the plaintiff to take reasonable care before signing the certificate : *Hall* v. *Semple* (4), and it was his act which caused the plaintiff's detention in the asylum : see per Lord Finlay in *Everett* v. *Griffiths.* (5) The order of the justice cannot be said to be a new, independent order.

[They also referred to *Latham* v. *Johnson & Nephew.* (6)]

Carthew in reply. A person cannot be notionally insane. Whether he is insane or not is a question of fact, and here it has been found that the plaintiff was not of unsound mind. He cannot, therefore, claim the protection of s. 7 of the Act of 1623.

Cur. adv. vult.

April 27. HORRIDGE J. read the following judgment : This was an action brought by the plaintiff against the

(1) (1669) 2 Saund. 120.
(2) (1676) 2 Mod. 71.
(3) 4 Ad. & E. 912.
(4) (1862) 3 F. & F. 337.
(5) [1921] 1 A. C. 631, 667.
(6) [1913] 1 K. B. 398.

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defendant, a medical man, for having, without reasonable care, on November 10, 1912, given a certificate under s. 4, sub-s. 2, of the Lunacy Act, 1890, that the plaintiff was a lunatic, and a proper person to be taken charge of, and detained under care and treatment.

A reception order dated November 10, 1912, was subsequently made, under which the plaintiff was detained, and taken to a licensed house at West Malling.

At the trial before me and a special jury the jury found that on November 10, 1912, the plaintiff was not of unsound mind, that the defendant did not act with reasonable care, and they assessed the damages at 500*l.*

On behalf of the defendant certain contentions that he was under no liability were subsequently argued before me. It was contended that the defendant owed no duty to the plaintiff to exercise reasonable care. In *Hall* v. *Semple* (1) Crompton J. directed the jury that if a medical man assumes, under the Lunacy Act then in force, the duty of signing a certificate of insanity without making, and by reason of his not making, a due and proper examination, and such inquiries as are necessary, and which a medical man, under such circumstances, ought to make, and is called upon to make, not in the exercise of the extremest possible care, but in the exercise of ordinary care, so that he is guilty of culpable negligence, and damage ensue, then that an action will lie, although there has been no spiteful or improper motive, and though the certificate is not false to his knowledge. In *Everett* v. *Griffiths* (2) Lord Cave, in his opinion, says: "In these circumstances, while I do not desire to be considered as throwing any doubt upon the correctness in point of law of the opinion expressed by Crompton J. in *Hall* v. *Semple* (1), that a medical man who negligently signs a certificate of insanity upon which an order of detention is founded may be made liable in damages for any injury so caused, I express no final opinion upon that point." The matter was very fully discussed by Scrutton L.J. in *Everett* v. *Griffiths* (3),

(1) 3 F. & F. 337. (2) [1921] 1 A. C. 631, 680.
(3) [1920] 3 K. B. 163, 195.

where he says: "It seems to me, therefore, that a doctor who voluntarily certifies under the Act of 1890, not at the request of the person examined, but as evidence for the guidance of an independent authority, incurs no liability to the person examined, as there is no legal relation between them"; but, on the other hand, Bankes L.J. says (1): "I think that the respondent Anklesaria"—who was the doctor in that case—"by undertaking the examination of the appellant, did come under a duty to him, though the extent and limits of that duty must, I consider, be ascertained by reference to the terms of the statute by which the examination is prescribed." In his dissentient judgment Atkin L.J. takes the same view as Bankes L.J. He says (2): "I think, therefore, that there was a duty owed by the chairman and the doctor to the plaintiff to take reasonable care to satisfy themselves that the plaintiff was a lunatic before respectively signing a detention order or signing a certificate; and I think that the duty of the doctor extended to exercising a reasonable degree of professional skill."

In this case my own opinion coincides with that of Crompton J., and I think, on the state of the authorities, I should follow the direction he gave to the jury, and hold that a doctor who undertakes the statutory duty of certifying must use reasonable care, and if he fails to do so the damages occasioned to the individual as to whom the certificate is given can be recovered against him.

The next point raised was that the cause of the plaintiff's detention was the independent order of the justice, and not the certificate of the doctor. This contention is founded on the judgment of Lord Reading C.J. in *Everett* v. *Griffiths* (3), which I have already referred to. That was an action in respect of a certificate given under s. 16 of the Lunacy Act, 1890, but under that section, as under ss. 4 to 6, the certificate of the doctor is clearly a condition precedent to the making of the order by the justice, and by the chairman of the Board of Guardians, acting as a justice of the peace, and,

(1) [1920] 3 K. B. 183. (2) [1920] 3 K. B. 218.
(3) [1920] 3 K. B. 163, 169.

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in fact, is given for the express purpose of enabling such an order to be made. No verdict of the jury had been obtained, but Lord Reading gave the following judgment for the defendant (1): "It is not the medical certificate which causes the detention, it is the order of the justice which brings about the detention. It is quite true, and it may well be said that had it not been for the medical certificate the justice would not have made the order he did; but that has been discussed in cases, and in the case in which Lord Esher gave judgment, which has been quoted, I think his observations apply to the effect that although the certificate may be said to be a causa sine qua non, it is not the causa causans. That means, in other words, that although the giving of a certificate helped to bring about the making of the order by the justice, the actual cause of the detention is the order, and not the certificate." The case on which the learned Lord Chief Justice founded his decision was *Thompson* v. *Schmidt.* (2) The certificate in that case was given under s. 20 of the Lunacy Act, 1890, which does not require any certificate of a doctor as a condition precedent to the detaining of the alleged lunatic. The certificate was only obtained at the request of the relieving officer before he took the plaintiff to the Hoxton Infirmary. The doctor was in no way discharging any statutory duty, and in no way was the giving of his certificate required by the Act of Parliament, and he was merely employed by the plaintiff's wife to satisfy the mind of the relieving officer before he acted on his own responsibility. In these circumstances there was clearly no liability on the part of the medical man to the plaintiff, and his certificate was in no legal sense a cause of the act of the relieving officer, even if that act would not, in fact, have taken place without first obtaining the doctor's certificate. The difference between that case and *Everett* v. *Griffiths* (3) was pointed out by Bankes L.J. When *Everett* v. *Griffiths* (3) was before the Court of Appeal I think

(1) This quotation is taken from the Appendix to the printed case in the House of Lords.

(2) 56 J. P. 212.

(3) [1920] 3 K. B. 163, 181.

Scrutton L.J. (1) intended to express approval of the view of Lord Reading, but in the report of the case in the House of Lords (2) Lord Finlay says: "The Lord Chief Justice decided on such further consideration, in favour of Dr. Anklesaria, upon the ground that it was not any act of his which caused the detention. 'He was consulted,' the Lord Chief Justice said (Appendix, p. 29), 'in an advisory capacity. His opinion was expressed to the justice of the peace in good faith, and the justice acted upon it. There is an interposition of the act of the justice which constitutes the detention. It is not the medical certificate which causes the detention, it is the order of the justice which brings about the detention.' I regret," says Lord Finlay, "that I am unable to concur with the Lord Chief Justice as to the validity of this ground for his decision. If it be a duty on the part of the medical man to exercise reasonable care in giving the certificate I think it is impossible to exclude from consideration as an element of damage flowing from such a certificate of lunacy, if negligently given, the fact that the order followed. By the terms of s. 16, but for the existence of the certificate the order could not be made at all. And further we cannot leave out of account the effect which that certificate might and in all probability would have on the mind of the justice who made the order. Not only is the medical certificate a condition precedent to the making of the order, but it may also have a most important effect in leading the justice to the conclusion that the person is a lunatic." The decision of the Court of Appeal, subsequently affirmed in the House of Lords, was based, not upon the ground taken by the Lord Chief Justice, but on the ground that there was no evidence of want of reasonable care on the part of the doctor.

Having regard to the state of the authorities, and after the expression of opinion by Lord Finlay, I feel it is incumbent upon me, notwithstanding the respect I should pay to the judgment of so distinguished a judge as Lord Reading, to form my own opinion on the matter. In my view the remarks of Lord Finlay express the law correctly, and in a case under

(1) [1920] 3 K. B. 192. (2) [1921] 1 A. C. 631, 667.

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the statute, as in this case, where no order can be made by a justice without the certificate of the doctor, and where the certificate is obtained with a view to obtaining an order, I think the negligent giving of the certificate was a direct cause of the reception order and detention. In *Latham* v. *Johnson & Nephew* (1) Hamilton L.J. says: "Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a causa sine qua non, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief." In this case the doctor, who was guilty of the original negligence, ought reasonably to have anticipated, as the result of his negligence, the making of the reception order, and therefore, in my view, the making of the order was not the intervention of a fresh independent cause, and the defendant is, in my opinion, liable for the consequences of his negligence, even though the actual order under which the plaintiff was received was made by the justice.

The remaining point which was argued before me was that the claim is barred by the Limitation Act, 1623 (21 Jac. 1, c. 16), inasmuch as the act complained of was completed on November 10, 1912, and this action was not brought until May 31, 1922. On behalf of the plaintiff, it was said that he came within the protection of s. 7 of the Act of 1623 as being a person who, at the time the cause of action accrued, was non compos mentis. It was argued that s. 7, inasmuch as it does not repeat in the description of actions an action upon the case, did not extend the proviso to actions on the case, although these actions were within the earlier section—s. 3. I think the result of the case of *Piggott* v. *Rush* (2) and the authorities cited by the judges in that case, show that on a

(1) [1913] 1 K. B. 398, 413. (2) 4 Ad. & E. 912.

liberal interpretation of the statute the proviso would extend to actions on the case within s. 3.

It remains to consider whether the plaintiff was within the disability of being non compos mentis. The jury have found as a fact that he was of sound mind on the date when the order was made, and the plaintiff's contention throughout has been that he was of sound mind. An argument has been addressed to me that because when once the reception order is made he is subsequently described under the Act as a lunatic: see ss. 35 and 50 of the Lunacy Act, 1890, therefore he must be taken, for all purposes, and for the purposes of s. 7 of 21 Jac. 1, c. 16, to be non compos mentis. I do not think this is a correct view. I think the question whether or not he is non compos mentis is a question of fact which the jury have found in his favour in accordance with his contention, and that, therefore, he is not protected by the proviso. It is to be observed that in s. 7 the disabilities originally included imprisonment, but this disability was abolished by the Mercantile Law Amendment Act, 1856, s. 10. No doubt the result of the statute, if I am right in my view of it, may work hardship, but my duty is merely to construe the statute, however much I may regret the result to which it forces me to arrive. I therefore give judgment for the defendant.

Judgment for defendant.

J. S. H.

The plaintiff appealed. The appeal was heard on July 21.

Cremlyn and *Macaskie* for the appellant. Time did not run in this case by reason of the proviso in s. 7 of the Limitation Act, 1623, exempting a person non compos mentis and allowing him to bring his action within the time limited after becoming of sane memory "as other persons having no such impediment should have done." From the moment when the reception order was made and during the whole of the time of his detention, the appellant was at law a person of unsound mind; he had been found such by judicial authority, and he occupied the status and suffered

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all the disabilities of a person of unsound mind. "As other persons having no such impediment" requires a wide construction; and means that time is not to run so long as a man is not in the same position as other people. No man detained in an asylum, whether sane or insane, can issue a writ or initiate proceedings "as other persons having no such impediment" could have done. If the appellant suffered any impediment through being detained, whether he was compos, or non compos, mentis, he comes within the proviso. Sect. 7 also includes the case of a feme covert, but *Shipman* v. *Shipman* (1) illustrates how in respect of her property her disabilities have been removed and shows that the words of the section can be altered.

[LORD HANWORTH M.R. His status was not altered by the reception order; there is a marked difference in the Lunacy Act, 1890, between a lunatic so found and a person detained under a reception order.]

The reception order was an authority to the doctor in the asylum to receive and detain him, and during the whole time he was an inmate he could not bring an action by a next friend, or get a solicitor to bring an action. He tried to do so, but could not.

[LORD HANWORTH M.R. You must show how an action on the case comes within s. 7.]

Sect. 7 of the Act is co-extensive with and illustrates s. 3. All actions on the case are within ss. 3 and 7: *Roche* v. *Hepman* (2); *Chandler* v. *Vilett* (3); *Crosier* v. *Tomlinson* (4); *Piggott* v. *Rush*. (5) The equity of the statute requires that "non compos mentis" should include not only a person in fact insane but also a person who in law has been treated as insane and visited with all a lunatic's disabilities. The Lunacy Act, 1890, s. 35, sub-s. 1, refers to a person in respect of whom a reception order is made as "the alleged lunatic" down to the date of the order, and afterwards as "the lunatic."

(1) [1924] 2 Ch. 140.
(2) (1729) 1 Barn. (K. B.) 172.
(3) 2 Saund. 120.
(4) 2 Mod. 71.
(5) 4 Ad. & E. 912.

Lowe v. *Fox* (1); *Strithorst* v. *Graeme* (2); and *Townsend* v. *Deacon* (3) are instances of a liberal interpretation of s. 7 of the Limitation Act, 1623.

The respondent cannot take advantage of his own wrongful act and set up the Limitation Act in defence: *Hawkins* v. *Hall.* (4) *Gowan* v. *Wright* (5) shows that the principle upon which the Court acts is to prevent injustice. "For the purpose of the English Statutes of Limitation, ... a cause of action does not accrue unless there be some one who can institute the action," per Lord Parker in *Meyappa Chetty* v. *Supramanian Chetty.* (6) The respondent by his certificate prevented the appellant from bringing his action, and he cannot now raise the defence of the statute.

On the question of costs, the appellant as plaintiff in the Court below succeeded upon two issues—namely, liability and amount, and failed only on the point of law, and he ought to have the costs of those issues upon which he succeeded: *Reid, Hewitt & Co.* v. *Joseph.* (7) No special direction as to costs was made by Horridge J., as he thought it unnecessary and left it to the taxing Master. But we submit that the judge at the trial was the proper person to direct that the plaintiff was entitled to the costs of the issues on which he succeeded: *Bush* v. *Rogers.* (8)

[SCRUTTON L.J. referred to *Hoyes* v. *Tate.* (9)]

Neilson K.C. and *Carthew* for the respondent were called upon only on the question of costs. We do not dispute that there were separate issues at the trial, but the judge refused to make a special direction as to costs, and in so doing he exercised his discretion deliberately, and this Court has no power to alter his decision: *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* (10)

LORD HANWORTH M.R. stated the facts and continued: This is an appeal from Horridge J., who decided that the

(1) (1885) 15 Q. B. D. 667.
(2) (1770) 2 Wm. Bl. 723.
(3) (1849) 3 Ex. 706.
(4) (1839) 4 Myl. & Cr. 280.
(5) (1886) 18 Q. B. D. 201, 203.
(6) [1916] 1 A. C. 603, 610.
(7) [1918] A. C. 717.
(8) [1915] 1 K. B. 707.
(9) [1907] 1 K. B. 656.
(10) [1914] 3 K. B. 28.

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plea of the Statute of Limitation, 1623 (21 Jac. 1, c. 16), raised by the defendant was fatal to the plaintiff's claim.

We have to consider and construe that statute, which provides that in certain actions, catalogued in s. 3, the proceedings must be taken within six years next after the cause of such action, and not after. This action is to be treated as an action on the case within that section. Sect. 3 therefore definitely provides that the time limit applicable to such an action is six years after such cause of action. Nothing could have been made more clear than that this defendant was sued in respect of the act which he did, or the negligence which he committed, on November 10, 1912. The six years then ran out by November 10, 1918, and yet no action was commenced until three and a half years afterwards.

Sect. 7 of the statute contains a proviso which enures to the benefit of certain persons who are under a disability and are unable to take their proceedings at the earliest moment or within the time limit fixed by s. 3. That proviso is as follows—I will read the material words: "Provided, nevertheless, that if any person or persons that is or shall be entitled to any such action . . . . shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

An obvious objection to the applicability of that proviso arises from this, that the actions which are catalogued in the proviso are not the same as those that are catalogued in s. 3. An action on the case does not appear in the proviso, whereas it does appear in s. 3. It might well be held then that with regard to actions within s. 3 the time limit is absolute, and that only such actions as are expressly named in s. 7 can have the proviso attached, and inasmuch as the action on the case

is not in s. 7 the plaintiff in this case cannot in any event rely upon the proviso which enures to the benefit of persons non compos mentis. It has already been decided by several authorities to which our attention was called, and, in particular, in *Piggott* v. *Rush* (1), that what is called a generous interpretation should be given to s. 7, and that the intention must be held to be that those actions which are within s. 3 are also within s. 7; or at any rate, if that is stating the proposition too widely, that an action on the case is within the proviso in s. 7. So the plaintiff says that he was non compos mentis, that he was detained under a reception order as from November 10, 1912, and that until he regained his liberty on October 15, 1921, the time limit of six years under the statute did not begin to run against him. There is a simple answer which was presented to Horridge J. and which is contested in this Court, and it is this: that the jury have found that on November 10, 1912, he was of sane mind, that he was not a person non compos mentis, and that in presenting this argument he is endeavouring to get an advantage derived from two inconsistent positions—namely, to affirm that he was of sound mind—a view which the jury accepted and for which they gave him a verdict of 500*l.*—and at the same time to present the view that for the purposes of the statute of James he was of unsound mind, and is discharged from the duty of bringing his action within the time limit of six years.

It has been pointed out in the course of the argument that the fact that a man or woman is detained under a reception order does not prevent the possibility of their bringing an action. It must be remembered that detention under a reception order is a different thing from a finding by inquisition that a person is of unsound mind. The contrast to my mind is made abundantly plain if the relevant sections of the Lunacy Act, 1890, are looked at. A reception order can be made under s. 4. A relative makes the petition, a doctor signs the certificate, and the justice appointed for that purpose to perform the duty makes the reception order.

(1) 4 Ad. & E. 912.

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Those three steps are necessary to a reception order, whereas if a person is found a lunatic by inquisition he may be received into an institution for lunatics upon an order signed by the committee of the lunatic—that is, the committee to whom the custody of the lunatic is entrusted—or, if there be no committee, he may be received into an institution merely upon an order signed by a Master in Lunacy. The important step of the inquisition, followed by the finding that the person is a lunatic, justifies the taking of much more summary steps than can be taken under a reception order, for those steps are to be taken in respect of a person who is alleged—not found—to be a lunatic.

It is, however, argued before us that, inasmuch as a reception order is referred to in the earlier sections as being the order to be made in respect of the person of an alleged lunatic, when once the reception order has been made, and the lunatic is detained, he becomes, and is referred to in a number of later sections as, a lunatic; that, inasmuch as in the interpretation clause of the Act a "lunatic" is defined to be an idiot or a person of unsound mind, you must read those later sections which refer to the lunatic and his property as including "a person of unsound mind"; and that, therefore, where a man is detained under a reception order he is to be deemed to be a person of unsound mind, non compos mentis, and thus brought within the proviso contained in s. 7 of the statute of James.

We have looked very carefully into this matter and have examined a number of cases which have been brought to our attention; we have gone through a number of sections of the Act of 1890 on which that argument was founded by Mr. Macaskie; but the matter really comes back to the construction which is to be placed upon this proviso in s. 7. It is said that following the cases to which I have referred and which dealt with the inter-relations between s. 3 and s. 7, a liberal interpretation ought to be given to this proviso, so that it should enure for the benefit of the plaintiff and to the disadvantage of the defendant. That sort of construction seems to carry with it inherent dangers. It is not for this

Court to say whether we ought to read or misread an Act of Parliament in order to do what we may think is an act of justice or generosity to a particular party. The two parties are before us, and we have to consider their rights under the terms of an Act of Parliament. The dates which I have mentioned, and to the relevance of which I have called attention, both from the point of view of the plaintiff and the defendant, compel me to say, that in a number of cases it may work great hardship to a defendant if a cause of action may supervene and survive so long as this one, in which it was not until May, 1922, that the action was commenced against him for conduct on his part which took place in November, 1912. It is not easy for the parties on either side to collect the relevant evidence, and to call the necessary witnesses, if ten years have elapsed from the time when the cause of action accrued. It was indeed for this reason that the statute was passed for the limitation of actions and for the purpose of avoiding suits, and the statute has been held many times over to be a statute which prevents the remedy, but does not cut at the root of the cause of action itself.

I therefore come to deal with the section as it stands. A note attached to it in the printed copy that I have calls attention to the fact that this proviso replaces, or rather renews and enlarges, a section which appeared in an Act of 32 Hen. 8, c. 2, and it is noticeable that in that proviso, which appears in s. 8, there is no relief given to those persons who are non compos mentis. We have to construe a very few words in the last part of s. 7. Adopting the view that the actions that are referred to in ss. 3 and 7 are the same, the liberty given to those persons who are under disability—the married women, the non compos mentis, the persons who are imprisoned or beyond the seas—is limited in this way: "so as they take the same"—that is bring the same actions—"within such times as are before limited"—that is by s. 3—"after their coming to or being of full age, discovert, of sane memory, at large"—as contrasted with being in prison—"and returned from beyond the seas, as other persons having

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no such impediment should have done." I read those words "no such impediment" as quite clearly referring to the impediments which all those persons, who are before referred to, suffered equally, the married woman, the non compos mentis person, the person in prison or beyond the seas. They have all the impediment arising from their disability, as a married woman at that time, or from their imprisonment, or absence beyond the seas. Those are the impediments referred to. I cannot find any justification for reading those words so loosely as to refer to such impediments as may be imposed by reason of the fact that there was a reception order made and other inconveniences suffered which made it difficult for the plaintiff to commence his action. The statute appears under s. 3 to be absolute, but to give a certain relief in s. 7, but not more. If that relief does not cover the circumstances of the case the action is definitely barred by s. 3

In the present case, after due and careful consideration of the authorities, it seems that there is none which has established that you are to treat the words "non compos mentis" as meaning anything else but a person of unsound mind. I see no reason for saying that they include, or are intended to mean, a person who is wrongfully alleged to be of unsound mind, and consequently is detained under a reception order. Either the person is or is not of unsound mind. The jury have held that Mr. Harnett was not of unsound mind, and on that ground they adjudged him entitled to some compensation. It is, therefore, impossible for him to affirm that he is released from his duty of complying with s. 3 on the basis that he was of unsound mind, or is to be treated as of unsound mind. Being found to be of sound mind he must comply with the provisions of the statute, which require his action to be brought within a time limit, a condition which he has not fulfilled.

For these reasons it appears to me that the judgment of Horridge J. was right, and that the appeal must be dismissed.

One subsidiary point was taken—namely, that inasmuch as the plaintiff had succeeded upon the issues of liability and amount, and had failed only upon the point of law of the

Statute of Limitation, the costs of the action ought to be treated distributably, and that the plaintiff ought to be allowed the costs of those issues on which he had succeeded. It is clear from a later statement of Horridge J. that that was his purpose and intention. He thought it was unnecessary to give a special direction as to that, and he was prepared to leave it to the taxing Master. On examination of the matter it appears that upon that point he was wrong, and Mr. Neilson, who has brought to our attention the exact circumstances, does not intend to argue that this is not a case in which there were issues. Under those circumstances, the judge's intention being clear, it appears to us that the plaintiff, although his action fails on the point of law taken, ought to be entitled to have the costs of the issues on which he succeeded taxed and paid to him. On that ground we will alter the order. The result is that on the main point the appellant, the plaintiff, fails, but on the subsidiary point as to costs he succeeds. Under these circumstances the appeal will be dismissed, but without costs.

WARRINGTON L.J. In this case the plaintiff on May 31, 1922, issued his writ in this action claiming damages against the defendant for negligently and without reasonable care certifying him, the plaintiff, as a person of unsound mind, for the purpose and with the consequence that he was detained under a reception order. The action, therefore, was brought in respect of a cause of action which accrued to the plaintiff on November 10, 1912, nine years and six months before the writ was issued. Prima facie, therefore, the action was clearly barred by the Limitation Act, 1623. The result of the action was that the jury found, in answer to the question whether the plaintiff was of unsound mind on November 10, 1912, that he was not of unsound mind on that date; in answer to the question whether the defendant acted with reasonable care, that he did not so act; and in answer to the question as to damages, that the damages were 500*l*. I only mention the answers of the jury to those questions for this reason: that it is quite obvious that the

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plaintiff succeeded in recovering the damages, because the jury found that he was not of unsound mind at the material time, and that the defendant was negligent, or did not exercise reasonable care, in certifying that he was of unsound mind. He now says that, notwithstanding that the jury have found he was not of unsound mind, he is entitled to the benefit of s. 7 of the Limitation Act of James I., which is, reading it shortly and only as applying to this particular case, as follows: "Provided, nevertheless, that if any person or persons that is or shall be entitled to any such action" on the case—I read the section with reference to the authorities, that is to say, so as to include the present action—"... shall be at the time of any such cause of action given or accrued, fallen or come, ... non compos mentis ... that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their ... being of ... sane memory, ... as other persons having no such impediment should have done."

It is contended on behalf of the plaintiff that we are to read those words, that expression "non compos mentis," as meaning and including, not only a person who is non compos mentis in fact but a person who being in fact compos mentis is wrongly detained under the provisions of the Lunacy Act as a person non compos mentis. That is what he asks us to do. With all respect to the arguments which have been addressed to us that seems to me to be a perfectly impossible contention.

Sect. 7 of the Act refers to a series of physical or social facts any one of which if affecting the person in question would relieve him or her from the strict necessity of bringing the action within six years, or, whatever the other period of limitation might be, from the accruing of the cause of action. Those physical or social facts are being within twenty-one years, that is to say infancy; being a feme covert, that is a married woman with a husband alive; non compos mentis, the expression in question; imprisoned, that is a person who is in fact detained in prison; or beyond the seas, that is again a person who is in fact beyond the seas. Then it goes on to provide that the action may

be brought within a time after the ceasing of that particular physical or social condition: in the case of infants, after their coming to or being of full age; in the case of married women, after their becoming discovert; in the case of persons non compos mentis, after they shall come to and be of sane memory; as to persons imprisoned, after they have come to being at large; and as to persons beyond the seas, returned from beyond the seas. It reduces itself to an absurdity if we are to read "the persons non compos mentis" in the sense in which the plaintiff here asks us to read them—namely, that we must read the words "come to and be of sane memory" as meaning being released from the confinement or the detention to which the person alleged of unsound mind has been subjected. It is quite impossible. I do not refer to the cases which have been cited to us, because they really do not touch this point; but when the words of the section are examined it seems to me that the only way is to read it literally and according to the ordinary meaning of the words in the English language. For this reason the appeal in my opinion fails.

With regard to the subsidiary question of costs I have nothing to add to what has been said by my Lord.

SCRUTTON L.J. The main point of this appeal turns upon a very few facts, and on the construction of a very few words in the well known Limitation Act, 1623.

On November 10, 1912, Dr. Fisher gave a certificate that Mr. Harnett was of unsound mind, and in consequence of that, and of another certificate of Mr. Harnett's regular medical attendant, Dr. Penfold, who is now dead, a magistrate made a reception order under which Mr. Harnett was removed to an asylum. On May 31, 1922, nearly ten years afterwards, Mr. Harnett brought an action against Dr. Fisher, and Dr. Fisher pleaded in the words of the Limitation Act that the action was not brought within six years of the occurrence of the cause of action, as in fact it was not. The answer made by Mr. Harnett's counsel to the plea of the statute was: "The seventh section of the statute, which provides that it

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shall not apply if the plaintiff is under certain disabilities, helps me here, and the words of the section on which I rely are 'non compos mentis.' It is true," say Mr. Harnett's counsel, "the jury have found that he was compos mentis, but for the purpose of the statute he is to be taken as non compos mentis, because the fact that he was being wrongfully detained on the allegation that he was non compos mentis puts such impediments in the way of his prosecuting his action that he ought to be treated as within the section, though in fact he was compos mentis, as the jury have found."

There is no doubt that at various times different ways of looking at the statute have prevailed in the Courts. It has been said that it is to have a generous or liberal application, but the Courts have differed which way a generous or liberal application is to be made. Sometimes the generous or liberal application is to let people bring actions, and sometimes the generous or liberal application is to stop people from bringing actions, but there is no doubt, as appears from the title, that the purpose of the Act was to stop people from bringing actions at a time when a good deal of the evidence had been lost; or, to use a phrase which is frequently employed, to stop people from bringing stale claims. Whichever is the right way of looking at it, I have no doubt that the main thing to do is to look at the words which have been used in the statute, and to give them their ordinary meaning.

Among a number of old cases I have come across one which so aptly expresses the view I take that I cite it. In the thirteenth year of Charles II., being the year 1662, and two years after Charles II. came back to the throne and the Commonwealth disappeared from England, one Prideaux brought an action against one Webber. (1) Prideaux claimed for an assault, battery, and imprisonment, and the defendant said that the assault, battery, and imprisonment were done on October 29, 1655, and pleaded the Statute of Limitation, the demurrer coming on more than six years after that date. "The plaintiff replies that certain rebels (not naming them) had usurped the Government, and none of the King's Courts

(1) (1662) 1 Lev. 31.

were open" ; which the plaintiff seemed to think was a good reason for not bringing an action if there were no Courts in which he could bring an action. Serjeant Bear argued for him : "That the Statute of Limitations is not pleadable, because there being a stop of Justice, and no legal Court, held, none was bound to prosecute." But the Court gave judgment for the defendant, and what the Court said was this : "And the reason they gave that the Statute of Limitations was a good bar, (be it so, as it was pleaded, that the Courts were not open)"—that is to say, they assumed there were no Courts in which you could bring an action—"was, because there is not any exception in the Act of such a case; and infants had been bound (thereby) if they had not been excepted." It appears to me that is exactly the reason why this appeal should be dismissed, that there is not any exception in the Act of such a case.

As I understand, the way in which we are asked to read the section is this : If impediments are placed in the way of the plaintiff's suing by his being wrongfully treated as if he were of unsound mind, then he is to be relieved from the necessity of bringing an action. All I can say is, in the language of the case in *Prideaux* v. *Webber* (1), "because there is not any exception in the Act of such a case" ; and more than that, when one looks at the cases the statute has been construed in such a way as to show that it is no sufficient answer to say : "But I was put in a great difficulty by what did happen, and could not reasonably bring my action." An example of that is *Gregory* v. *Hurrill* (2), which turned upon this : the statute of Anne, extending the statute of James, allowed a plaintiff longer time to bring his action if the defendant were beyond the seas. The plaintiff brought his action against Hurrill a long time after the cause of action, and said that Hurrill had been beyond the seas. But Hurrill proved that he had been passing through the Downs in a sailing ship, and had landed at Deal for one day to give a letter to the Swedish Consul, after which he had gone away beyond the seas again, and it was held that as he had been

(1) 1 Lev. 31.

(2) (1826) 5 B. & C. 341.

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within the realm, although it was quite obvious it was not reasonably possible for the plaintiff to know he was there, or sue him, the Statute of Limitations applied, and the time began to run from the day that he was within the realm, although the plaintiff did not know of it, and had no reasonable chance of knowing it. That is simply construing the words of the statute.

For the reason that I have already given, that there is not any exception in the Act of any such case, I feel bound to dismiss this appeal. I only want to say further on that point, as I have already said in one of Mr. Harnett's actions, that this is not the Royal Commission that is sitting to recommend changes in the law. What they may say about a point like this is not for me to conjecture. This Court sits to administer the law ; not to make new law if there are cases not provided for.

With regard to the question of costs, I desire to say this : We have had considerable trouble in this Court because learned judges have not remembered or paid attention to the judgment of Bankes J. in *Bush* v. *Rogers*. (1) A learned judge, where there are issues, ought to give directions in his judgment if he means that the plaintiff or defendant should have the costs of those issues. The learned judge in this case, not having been reminded of *Bush* v. *Rogers* (1), thought that he had provided for the issues by leaving them to the taxing Master, who would give them. He was wrong in that view. He has said himself that if he had been applied to before judgment was entered he would have given the costs of the issue to the plaintiff. In my view we ought to do what the learned judge would have done if he had been reminded of the position, and give the plaintiff the costs of the very important issues on which he succeeded.

Appeal dismissed.

Solicitor for the appellant : *H. Coulson.*

Solicitors for the respondent : *Le Brasseur & Oakley*

(1) [1915] 1 K. B. 707.

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Employer and Workman—Agricultural Labourer—Deduction from Wages—Set off—Minimum Rate of Wages—Onus of Proof—Agricultural Wages (Regulation) Act, 1924 (14 & 15 *Geo.* 5., *c.* 37), *ss.* 1, 2, 3, 7.

By the Agricultural Wages (Regulation) Act, 1924, ss. 1 and 2, Agricultural Wage Committees and an Agricultural Wages Board were established with powers to fix minimum rates of wages for workers employed in agriculture.

By s. 7, sub-s. 1: "Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and if he fails to do so shall be liable on summary conviction . . . . to a fine not exceeding 20*l*. . . . ."

Sub-s. 2: "In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate."

Sub-s. 3: "In any proceedings against an employer under this section the Court shall, whether there is a conviction or not, order the employer to pay in addition to the fine, if any, such sum as may be found by the Court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period."

Sub-s. 11: "Subject to any definition under this Act of the benefits or advantages which may be reckoned as payment of wages in lieu of cash and the value at which they are to be reckoned, and to any limitation or prohibition under this Act of the reckoning of benefits or advantages as payment of wages in lieu of cash, the Court may, in any proceedings under this Act, reckon as a payment of wages such amount as in the opinion of the Court represents the value of any benefits or advantages (not being benefits or advantages prohibited by law) received by a worker under the terms of his employment."

By an order of the Agricultural Wages Board dated March 10, 1925, the wages payable for employment of workers in agriculture for the district were fixed at 24*s*. a week for a worker of eighteen years, with a rising scale up to 32*s*. for a worker of twenty-one years.

By an order of the Agricultural Wages Committee for Monmouth dated July 4, 1925, the reckoning of any advantage or benefit as payment of wages in lieu of payment in cash for the purpose of the application of any minimum wages fixed by the committee was forbidden:—

Held, upon a case stated, that s. 7, sub-s. 2 (supra), does not displace the duty of the prosecution to make out a prima facie case. For this purpose proof must be given of the age of the worker, so as to enable

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the court to decide whether the proper rate of wage under the Act had been paid or not. The burden of proof then shifts to the employer to show that he has paid wages at not less than the minimum rate.

Held also, that in view of the above Act and the order of the Agricultural Wages Committee referred to, no deduction from the worker's wage either by way of set-off or otherwise was permissible for the purpose of reckoning the minimum rate of wage applicable.

Williams v. *North's Navigation Collieries* (1889), *Ld.* [1906] A. C. 136 followed.

CASE stated by Monmouthshire justices.

At a court of summary jurisdiction sitting at Raglan two informations were preferred on September 17, 1925, by William Jones, the appellant, an inspector for the purposes of the Agricultural Wages (Regulation) Act, 1924, against Francis Harris, the respondent, for that he on July 25, 1925, and on August 1, 1925, at Bettwys Farm, Raglan, in the said county, being a person who employed one Pugh, a worker in agriculture, paid wages to the said Pugh at a rate less than the minimum rate as fixed by the Agricultural Wages (Regulation) Act, 1924 (14 & 15 Geo. 5, c. 37), and Order No. 70 of the Agricultural Wages Board dated March 10, 1925, and orders Nos. 1 and 2 of the Agricultural Wages Committee for the county of Monmouth, dated March 7, 1925, and July 4, 1925, respectively. These informations were heard on September 26, 1925, when the court convicted and fined the respondent 2*s.* 6*d.* in respect of the offence committed on August 1, 1925, and ordered him to pay to Pugh 3*s.* 7*d.*, being arrears of wages due to him for the week ending August 1, 1925, in accordance with the provisions of the Agricultural Wages (Regulation) Act, 1924, and the Orders above mentioned. The justices stated a case at the request of the appellant in which the facts proved or admitted at the hearing were set out as follows :—

The appellant was a person duly authorized by law to institute proceedings under the Agricultural Wages (Regulation) Act, 1924. The Orders of the Agricultural Wages Board and the Agricultural Wages Committee for the county of Monmouth material to the case were : (1.) Order No. 70 of the Agricultural Wages Board (March 10, 1925), which

became effective from March 16, 1925. By a schedule to this Order the wages payable for employment of workers in agriculture were fixed at the following minimum rates:—

				s.	d.
Male workers,	21 years of age and over			32	0
,, ,,	20 ,,	and under 21		30	0
,, ,,	19 ,,	and under 20		27	0
,, ,,	18 ,,	and under 19		24	0

(2.) Order No. 1 of the Monmouthshire Agricultural Wages Committee dated March 7, 1925, which defined the employment to be treated as overtime employment, and (3.) Order No. 2 made by the Monmouthshire Agricultural Wages Committee on July 4, 1925, which prohibited the reckoning of any benefit or advantage as payment of wages in lieu of payment in cash for the purpose of the application of any minimum wages fixed by the committee. On August 11, 1924, the respondent entered into a contract with Pugh as a worker in agriculture—namely, a general farm labourer, on the respondent's farm at Raglan, Monmouthshire, at a weekly wage of 8*s*. together with board and lodging to be provided by the respondent, and the said Pugh continued in the respondent's service until August 6, 1925, under this contract. The value of the board and lodging provided by the respondent was 17*s*. per week. At the time when the contract of service was entered into, Pugh informed the respondent that he was eighteen years of age, whereas at the hearing it was stated that he was twenty-one years of age, but no certificate of birth was produced. Pugh did not inform the respondent at any time while in his employment that he was twenty-one years of age.

It was contended on behalf of the appellant that as from the date of the order of July 4, 1925, made by the Monmouthshire Agricultural Wages Committee the respondent was prohibited from reckoning as payment of wages the benefit of the board and lodging provided by him, and that he was bound to pay to Pugh such wages in cash without any deduction or set-off for any amount which might be owed

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by Pugh for board and lodging; that inasmuch as Pugh was at all material times over twenty-one years of age the respondent was bound to pay him wages in cash at a rate not less than the minimum rate fixed for workers of that age by Order of the Agricultural Wages Board dated March 10, 1925, and that the respondent was not excused from paying wages at a rate not less than that fixed by the order for workers of twenty-one years and over by reason of his belief in the truth of the statement made by Pugh that he was eighteen years at the date of the contract of service: that under the Agricultural Wages (Regulation) Act, 1924, s. 7, sub-s. 3, the court was bound to make an order for payment by the respondent of all arrears of wages which might be found due to Pugh in respect of the period between March 28, 1925, and August 6, 1925.

It was contended for the respondent that he was entitled to set off against wages the value of board and lodging provided by him as a debt due to him from Pugh: that the respondent was not bound to pay wages to Pugh at a rate higher than the minimum rate applicable to workers of Pugh's age as stated by him to the respondent: that the wages paid to Pugh were at no material time less than at the minimum rate applicable. Upon these facts the justices held (*a*) that there was no obligation on the respondent to pay out the full amount of his weekly wages to Pugh without regard to any sums due from him in respect of board and lodging, but that the respondent was entitled to set off as a debt due to him the amount of any weekly rent for board and lodging due and payable under agreement in force entered into between himself and Pugh in arriving at the amount payable by him to Pugh; (*b*) that inasmuch as no agreement had in fact been arrived at between the respondent and Pugh as to the amount payable by Pugh as rent for board and lodging, the respondent was not strictly entitled to treat the sum of 17*s*. a week as a debt due from Pugh (although such sum of 17*s*. was in their opinion a reasonable sum for him to pay), and that a technical offence had been committed by the respondent; (*c*) that a sum of 3*s*. 7*d*. was

in fact due from the respondent to Pugh. They therefore convicted the respondent and imposed a fine of 2*s.* 6*d.* and ordered him to pay 3*s.* 7*d.* to Pugh. The question for the opinion of the Court was whether on the above facts the decisions were correct in point of law.

Sir Douglas Hogg A.-G. and *Hull* for the appellant. By the combined effect of the Agricultural Wages (Regulation) Act, 1924, and the Orders to which reference has been made it became illegal after July 4, 1925, to pay wages at less than the minimum rate, and no deduction for board and lodging was permissible. The same principle was laid down in the Truck Acts, and the employer cannot take by way of set-off what is not allowed as a deduction: *Williams* v. *North's Navigation Collieries.* (1) By s. 7, sub-s. 3, of the Act (2), the workman is entitled to the difference between the wages actually paid and the wages due to him for the whole six months prior to the commencement of proceedings. This is quite apart from any penalty imposed.

As to the question of age the onus is upon the employer to show that he paid wages at the proper rate applicable. If he claims to have paid at a lower rate on the ground that the workman was eighteen and not twenty-one years of age, he must prove the age. It is no defence that he was deceived as to the man's age. The decision of the justices was wrong in law both as to the right of set-off and as to the onus of proof of the workman's age.

Singleton K.C. and *W. H. Williams* for the respondent. We do not now contend that there is a right of deduction or set-off for the cost of board and lodging, having regard to the Act and the Orders made by the Agricultural Wages Board and Committee. But liability only runs from July 4, 1925, when the Order was made.

As to the onus of proof, s. 7, sub-s. 2, of the Act (2) does not displace the duty of the prosecution to make out a prima facie case. The Minister must show what is the proper minimum rate applicable to the case. For this purpose he

(1) [1906] A. C. 136. (2) See headnote.

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must prove the age of the workman, so as to show the weekly wage payable according to the scale laid down by the Agricultural Wages Board in their Order of March 10, 1925. The onus then shifts to the employer to show that he pays that wage, or to give reason to the contrary. Here the justices state that they took the workman's age to be eighteen, and there is an implied finding of fact to that effect.

Sir Douglas Hogg A.-G. in reply. There is no finding of fact here as to the workman's age. The justices merely accepted the respondent's statement. The case should be sent back so that his true age can be proved at the rehearing. The whole of the six months prior to the information must be considered, having regard to s. 7, sub-s. 3 (1), for the purpose of reckoning arrears of wages due.

LORD HEWART C.J. [after referring to the Act itself, and *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (2), said:] It is apparent that in the present case as from July 4, 1925, there was an improper deduction of 17*s.* per week, and by s. 7, sub-s. 3, of the statute there is an imperative duty laid down: "In any proceedings against an employer under this section the Court shall, whether there is a conviction or not, order the employer to pay in addition to the fine, if any, such sum as may be found by the Court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period." It is now, in the course which the argument has taken, common ground that as from July 4, 1925, the sum of 17*s.* per week was improperly deducted.

With regard to the other question it has been suggested that under the provisions of s. 7, sub-ss. 1 and 2, the whole burden of proving the age of the worker referred to falls upon the employer. That seems to me to be an erroneous interpretation of these sub-sections. Sub-s. 1 provides: "Where

(1) See headnote. (2) [1906] A. C. 136.

any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate." It is provided by s. 9 that the Minister may appoint officers for securing the proper observance of the Act, and by sub-s. 4: "Any officer so appointed shall have power in pursuance of any special or general directions of the Minister to take proceedings in respect of offences against this Act." By s. 7, sub-s. 2: "In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate." What is the meaning of those provisions? In my opinion, it is the duty of the prosecution in proceedings of this nature to establish a prima facie case. The prosecution does not discharge this duty unless and until it appears that something less was paid than that which ought to be paid, unless indeed there is some provision of the statute to the contrary, to which no reference has been made in the course of the argument. To say that less has been paid than the minimum rate which is applicable, assumes, and must assume, that there is a certain minimum rate applicable, and when one looks to the schedule it is apparent that the rate which is applicable depends upon the age of the worker. Unless, therefore, there is some provision in the statute to which our attention has not been directed, the prosecution here ought to have begun by showing the age of this worker, so as to put the Court into a position to do the arithmetical sum, and to ascertain whether the proper number of pounds, shillings and pence has been paid. The prosecution having then made it appear that a less sum was paid than ought to have been paid, a thing which is based upon the proposition that a particular sum should have been paid, the burden shifts to the defendant to prove that he has paid wages at not less than the minimum rate. Here, so far as the prosecution was concerned, it is tolerably obvious from this case that the chronologically and logically fundamental question of the

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age of this young man at all material times was left vague. He went into the box and said that somebody had told him he was born somewhere at such and such a date. He also admitted that he had told his employer when he entered his employment that he was eighteen years of age. He then said that he was twenty-two years of age, and he further admitted that he had never informed his employer at any time during the employment that he was as much as twenty-one years of age. In those circumstances the justices appear (although the matter is not by any means certain) to have come to the conclusion that they were entitled to accept the evidence of the employer that the youth had said he was eighteen years of age, and that that age not being contradicted by any satisfactory evidence of any other age, they were at liberty to treat the youth as being of that age. It is obvious that where the amount of a minimum rate of wages depends on the age of the worker, what is in question is his true age, not statements which he may have made about it, because it is not to be forgotten that proceedings of this kind are brought by an official acting on behalf of the community, and in the interests of the community. The test is: What was the true age, and what was the minimum rate applicable to the true age?

I pass to the further question, whether, the present case having taken the course which we now know, the prosecution ought to have the opportunity of amending its case and offering at a later stage evidence, as for example a certificate of birth, which should have been offered at the outset. I do not think that we ought to give the prosecution a second opportunity of proving that matter, and therefore, although I am clearly of the view that what is of real importance is the true age, I think that for the purpose of the present case we must take it that the justices were not satisfied, and were entitled not to be satisfied, that this young man's age was different from the age which he had represented to his employers.

In these circumstances, I think that the case must go back to the justices with the direction that they took a wrong

view about the deduction of the estimated value of the board and lodging, and that that sum be calculated for the appropriate period after July 4, 1925. To that extent, I think that this appeal succeeds.

AVORY J. I concur in the judgment which has just been delivered, and I only wish to add that notwithstanding what Lord Bowen once described as the "tutelary shelter which the Legislature has thrown around the workman," in this case s. 7, sub-s. 2, ought not to be construed in the way in which it was suggested it might be construed—namely, that whenever a summons under the Act is taken out against an employer the whole burden is at once cast upon him of proving that he has not committed any offence under the statute. That would be so contrary to the principles on which the penal and criminal laws are administered in this country that one ought to seek by any means to avoid such a construction of this sub-section. I agree that what it means is that the prosecution, as in every other case, must at all events present a prima facie case against the accused person, and in order to present a prima facie case here, it was essential that they should give some evidence of the age of this worker. Under the circumstances, as the matter stood, the justices were entitled to assume that this worker was eighteen years of age only, and to deal with the case on that footing. In dealing with it on that footing, it does not appear that there was any evidence of any arrears due to him for the period prior to July 4. Upon the admission which has been made the real error into which the justices fell was in holding that if there was an agreement to set off the amount of any weekly rent for board and lodging, the employer could deduct that amount. They calculated the sum of 3*s*. 7*d*. on the footing apparently that that might be set off if there were any agreement, and according to the admission made at the Bar in arriving at that sum of 3*s*. 7*d*., they must have taken into account in some way that 17*s*. which they describe as a reasonable sum for the board and lodging. I agree therefore that the case must go back for them to determine what

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amount of arrears were due since July 4 up to the date when these proceedings were taken.

SALTER J. I am of the same opinion. The important question in this case is the construction of s. 7, sub-s. 2. I think that sub-s. 2 applies both to sub-s. 1 and to sub-s. 3. With regard to its effect upon sub-s. 1 I have nothing to add to what has been said by my Lord and Avory J., with which I agree. With regard to its effect upon sub-s. 3 I think that the prosecution have to prove the total minimum amount payable by the accused to the worker during the period of six months as defined in the sub-section. For that purpose, they have to prove (*a*) the relation of employer and employed, (*b*) that there was a working in agriculture, and (*c*) the age of the person alleged to have been underpaid, in order to establish the amount due. When the total amount payable has thus been proved by the prosecution the onus is upon the accused to prove that he has paid within the period not less than the sum named, and in so far as he fails to prove that, the court is to make an order for the payment of the difference.

Appeal allowed on this point, and case remitted.

Solicitor for appellant: *Official Solicitor to Ministry of Agriculture and Fisheries.*

Solicitors for respondent: *Ellis & Fairbairn.*

F. P. F.

[IN THE COURT OF APPEAL.]

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GILLETT *v.* JOHN FOWLER AND COMPANY (LEEDS), LIMITED.

Workmen's Compensation—Notice to diminish Compensation—Service of Notice and Medical Certificate within six Days—Necessary preliminary Step—Workmen's Compensation Act, 1923 (13 & 14 *Geo.* 5, *c.* 42), *s.* 14.

An employer seeking the benefit of the procedure provided by para. (*c*) of s. 14 of the Workmen's Compensation Act, 1923, for ending or diminishing weekly payments, must comply with paras. (14.) and (15.) of the First Schedule to the Act of 1906, by serving the certificate of his medical practitioner within six days from the date thereof. Unless this is done there is no power or procedure available for the subsequent appointment of a medical referee:—

James v. *Grovesend Steel and Tinplate Co.* (1925) 18 B. W. C. C. 405 applied.

APPEAL from an award of the judge of the Leeds County Court.

The appellant had been in receipt of 21*s.* 1*d.* per week as compensation in respect of an accident down to January, 1926. On January 13 he was examined by the employers' doctor, who certified that he had partially recovered. The employers then gave notice to the workman that they intended to reduce the compensation to 10*s.* 6*d.* per week, and sent with it a copy of the doctor's certificate, but they did not send the notice or certificate within six days from the date of the certificate. The workman did not receive the notice until January 21, and on February 6 the employers reduced the compensation to 10*s.* 6*d.* a week. The appellant served no counter-report under s. 14 of the Act of 1923, but on February 10 sent a letter to the employers objecting to the reduction and the procedure followed by them, and he commenced proceedings for arbitration on March 25.

The county court judge, basing his decision on the fact that para. (*c*) of s. 14 of the Act of 1923 does not specify time for service, and overlooking proviso (i.) to that section, which refers to para. (15.) of the First Schedule to the principal Act, decided that the workman had partially recovered and

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that the employers were no longer bound to pay him more than 8*s.* 9*d.* per week in respect of his partial incapacity. The workman appealed on the ground that until the award the employers had no right to diminish the weekly payment, and he relied upon s. 14 of the Act of 1923.

The appeal was heard on June 23 and 24, 1926.

Cave K.C. and *A. H. Armstrong* (*W. H. Duckworth* with them) for the appellant. The judge based his decision on the fact that para. (*c*) of s. 14 of the Act of 1923 does not specify any time for service of the certificate and notice of diminution on the workman, but proviso (i.) refers to para. (15.) of the First Schedule to the principal Act, and incorporates the provisions relating to a medical referee. It is essential for the employer to serve the certificate within six days, as provided by para. (15.) of the First Schedule, in order to comply with para. (*c*) of s. 14 of the later Act: *James* v. *Grovesend Steel and Tinplate Co.* (1); *Davies* v. *Glyncorrwg Colliery Co.* (2)

[They were stopped by the Court.]

Wingate-Saul K.C. and *W. Stewart* for the respondents. *James* v. *Grovesend Steel and Tinplate Co.* (1) was an agreement to refer to a medical referee and therefore para. (15.) clearly applied. But this case comes under s. 14 of the later Act, and para. (*c*) supplies a complete code in itself. The proviso (i.) only applies where a counter-report is sent by the workman, and not until then. When a counter-report is sent, then if the employer disputes it he has two choices, either (*a*) to pay in accordance with the workman's report, or (*b*) to go to a medical referee, and then para. (15.) comes into operation. But under the earlier part of para. (*c*) if, as here, the workman serves no counter-report, the employer can either determine or diminish the weekly payment. Para. (*c*) is a water-tight compartment, and if no counter-report is served the matter ends there. Proviso (i.) never came into operation in this case. Para. (15.) of the First Schedule is never mentioned in s. 14 until the stage is reached

(1) (1925) 18 B. W. C. C. 405. (2) [1925] 2 K. B. 339.

when the employer is not satisfied with the workman's counter-report, if then he has neglected to serve his certificate within six days, he penalizes himself by losing the option to go to a medical referee, but that does not apply if no counter-report is served.

Cave K.C. in reply. Proviso (i.) is clearly a part of para. (*c*) of s. 14 : *McLeod* v. *Glasgow Iron and Steel Co.* (1)

LORD HANWORTH M.R. Before the Act of 1923 was passed, if an employer, who was liable to pay compensation to his workman, desired to review the amount of the weekly payment or to end it on the ground that the workman had partially or wholly recovered his health, the procedure which he had to follow was to obtain an examination of the workman under para. (14.) of the First Schedule to the Act of 1906, and after a medical practitioner had made his examination and given a certificate, the employer was entitled to serve that certificate or the report of the medical practitioner as to the workman's condition within six days after the examination of the workman, and then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, upon an application being made by both parties the matter could be sent, under para. (15.), to a medical referee to determine.

A practice grew up, while the Act of 1906 was in operation alone, for the employers simply to terminate the payment that was made, and proceedings would then have to be taken by the workman to reassert his rights. The Act of 1923 is to be read and construed as one with the principal Act. So that we have, somehow, to put the two Acts together and read them as if they were one Act. By s. 14 of the later Act it was provided that the plan of ending or diminishing the weekly payments that had grown up on the part of the employers should be put an end to, and thereafter an employer could not end or diminish his payments except in the three ways which I pointed out as

(1) (1924) 18 B. W. C. C. 566, 570.

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follows in my judgment in the case of *Davies* v. *Glyncorrwg Colliery Co., Ld.* (1) "Pausing there, it seems quite plain that the section was intended to prevent the sudden ending or diminishing of weekly payments made by the employer under the Acts, excepting in the three cases provided—namely, the return to work, the earning by the workman of higher wages than he was being paid for his partial incapacity, or where the employer has served a certificate and that is accepted by the workman and is not countered by a report of his own medical man. Unless you can bring the matter within those three cases the plain words of s. 14 stand, that an employer is not entitled to end or diminish a weekly payment." We have, therefore, to remember that this system to which I have referred, established and in operation for a number of years, by means of the examination under para. (14.) of the First Schedule to the Act of 1906, and the subsequent procedure under para. (15.) of that Schedule, was in operation and is to be dovetailed and read into and dealt with as a part of the totality of the two Acts of 1906 and 1923. Sect. 14 of the Act of 1923, para. (*c*), commences: "Where the medical practitioner who has examined the workman under para (14.) of the First Schedule to the principal Act"—that plainly indicates that para. (14.) is intended to be part of and superadded to the scheme which existed under the Act of 1906. Then it continues: "Where the medical practitioner . . . . has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate . . . . together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman"—that is the third case where an employer is justified in ending or diminishing a weekly payment. But there is the proviso which enables the workman to assert his rights counter to that notice which has been served by the employer, and if

(1) [1925] 2 K. B. 339: 18 B. W. C. C. 90.

he obtains a report disagreeing with the certificate served by the employer, the weekly payment is then not to be ended or diminished except in accordance with the report of the workman's doctor, or if and so far as the employer disputes such report, except in accordance with a certificate given by a medical referee in pursuance of para. (15.) of the First Schedule as amended by the Act of 1923.

It is said that inasmuch as para. (*c*) of s. 14 of the Act of 1923 does not impose any time limit within which the employer must serve the certificate of a medical man upon the workman, it may be served at any reasonable time, and for that purpose you may neglect the plain words which are contained in para. (15.) of the First Schedule to the Act of 1906. That paragraph definitely provided that if the employer was proceeding to act upon the report of a medical practitioner which he had obtained by means of or upon the examination of a workman made under para. (14.), he must serve that report within six days. It is difficult to see why that time limit to prevent a stale certificate being served upon the workman applies only in examinations which take place under the Act of 1906 and not in examinations which take place under s. 14 of the Act of 1923. It is difficult, I think, also, if you are reading all the statutes together, to avoid the conclusion that you have to fit the sections and paragraphs of the two Acts so as to work together.

It is also said that under the system provided in s. 14 of the Act of 1923, if the employer's certificate is countered by a workman's medical practitioner's report, then the employer can only act in accordance with the report of the workman's medical practitioner unless and until he obtains a more favourable report, from his point of view, from a medical referee, and it is therefore unnecessary to introduce the time limit of six days to the service of the certificate obtained by the employer, which is the first step to introducing the procedure provided by para. (*c*) of s. 14 of the Act of 1923.

If the matter were quite fresh and independent of any decisions, I should have great difficulty in rejecting the

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procedure indicated by para. (15.) of the First Schedule to the Act of 1906, because it appears to me that s. 14 of the Act of 1923 is intended to be superimposed and to work upon a system which was in operation under the Act of 1906, and, inasmuch as para. (*c*) of s. 14 of the later Act begins by referring to an examination of the workman under para. (14.) of the First Schedule to the Act of 1906, and later deals with the system of referring the two certificates to a medical referee under para. (15.) of the same Schedule, it appears to me that the intention was not to disregard in any detail the practice which then had been in operation, and was working under paras. (14.) and (15.) of the First Schedule to the earlier Act.

But it appears to me that this Court has already given a definite decision, which is binding upon us at the present time, that in the working of the procedure under s. 14, para. (*c*), of the Act of 1923, there is a limit imposed upon the employer if he intends to make use of the certificate of the medical practitioner which he has obtained. That condition or limit is that he must serve it within six days after such examination. In the case of *James* v. *Grovesend Steel and Tinplate Co.* (1) we had to determine whether or not s. 14 of the later Act applied where there had been a recorded agreement. There had been no service in that case of the report of a medical practitioner made at the instance of the employer within six days, but that condition, if it was a condition, had been waived by the parties, and they desired to bring before the Court the question to which I have referred. The decision of the Court was that that admitted waiver was ineffective and that the question whether a recorded agreement fell within the procedure of s. 14 did not arise, because there had been no valid step taken to bring its terms into operation. The defect which we pointed out there was that the employers did not within six days of their medical report furnish the workman with a copy of it. Warrington L.J. speaks of that term as essential, if jurisdiction under s. 14 was to be founded.

(1) 18 B. W. C. C. 405.

Atkin L.J. said: "Notice of the medical report not having been given within the stipulated six days it was clear that the terms of the Act had not been complied with." For my own part, I said that the service by the employers of the medical report within six days was essential. For the reasons which I have already given, I adhere to the view there expressed, and I think it is essential, in order to comply with para. (*c*) of s. 14 of the Act of 1923, that the employer must serve the report of the medical practitioner within six days in accordance with the terms laid down in para. (15.) of the First Schedule to the Act of 1906.

I think it would be unfortunate if there were two forms of procedure under para. (*c*), one by which the employer could serve notice of the report he had received within a reasonable time but by reason of his doing so was precluded from ultimately going to a referee if the workman served a counter notice and a disagreement arose; and the other a procedure under which he did comply with the limitation of six days and so made it possible, if it should later become necessary, for him to be able to go to the referee. The matter is really not of very great importance in itself; what is important is that there should be a practice definitely understood, because if it is definitely understood it is not difficult to comply with. The effect of our decision here, based upon *James* v. *Grovesend Steel and Tinplate Co.* (1), is that there is introduced into para. (*c*) a duty on the part of the employer where he is serving the certificate of a medical practitioner, to serve it within six days from its date, thus avoiding any staleness on the part of the certificate, and giving the workman's doctor practically the same chance of investigating the condition of the workman as the employer's doctor had.

It appears to me that upon the two cases to which I have referred the matter has already been decided by this Court, and therefore the appeal ought to be allowed.

In the present case the county court judge decided on May 4 that there was a partial recovery on the part of the workman, and that the employers were no longer bound to

(1) 18 B. W. C. C. 405.

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pay him more than a sum of 8*s.* 9*d.* a week in respect of his partial incapacity. The employers had paid him from February 6 at the rate of 10*s.* 6*d.* a week, but what the workman seeks to recover is the difference between that 10*s.* 6*d.* and the 21*s.* 1*d.* which he was receiving before February 6, on the ground that until the employers had obtained on May 4 a proper award reducing the amount, they had not effectually terminated their duty to pay to him 21*s.* 1*d.* a week, and that by the terms of s. 14 of the Act they were precluded from ending or diminishing their payments.

It appears to me, for the reasons which I have mentioned, that that contention is right, and that inasmuch as the procedure of s. 14 does not avail the employers, they were not right in ending the payment which it was their duty to pay before the award was made, with the result that the balance unpaid between the sum of 10*s.* 6*d.* and 21*s.* 1*d.* is due to the workman and an award will have to be made for that amount, whatever it be. The appeal will be allowed with costs and an award made for the sum due to the workman which, I have no doubt, counsel will be able to agree.

SCRUTTON L.J. Once more the Court is faced with a series of statutory nightmares which the consideration of s. 14 of the Act of 1923 always raises. If I had to face those nightmares with my own unaided intelligence I am not sure at what result I should arrive. But in my view I am saved the trouble of thinking about what the statute means by two decisions of this Court by which I am bound. I only have imposed upon me the minor necessity of understanding what those two decisions mean.

In this case, on May 4, 1926, the county court judge found that the workman had partially recovered on February 6, 1926, and awarded that from May 4 he should receive 8*s.* 9*d.* a week compensation. But he said nothing expressly about what was to happen between February 6 and May 4. Presumably, therefore, he rejected the workman's claim to recover 21*s.* 1*d.* a week from February 6 to May 4, and the

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workman thereupon gave a notice of appeal asking that he should be paid the full amount from February 6 to May 4.

Sect. 14 of the Act of 1923 provides that an employer shall not be entitled to diminish a weekly payment under the principal Act except in the specified cases; the employer, therefore, who has diminished the payment of 21*s.* 1*d.* to 10*s.* 6*d.* from February 6 to May 4 must bring himself within the provisions of that Act. The relevant matters are "otherwise than in pursuance of an agreement" —there is no agreement—"or arbitration"—that will turn upon what the county court judge can do in this arbitration —or where the medical practitioner who has examined the workman under para. (14.) of the First Schedule to the Act of 1906 has certified that the workman has partially recovered and a copy of the certificate together with notice of the intention of the employer at the expiration of ten clear days from the date of the service to end the weekly payment has been served by the employer upon the workman. The medical practitioner did examine the workman under para. (14.) of the First Schedule to the Act of 1906. That was the only provision which required the workman to be examined, and a copy of the certificate with notice to terminate at the end of ten clear days was served upon the workman. The employer says: "Thereupon I came within s. 14 and I was entitled to diminish the payment"; to which the workman replies: "No, you were not entitled to diminish the payment because para. (15) of the First Schedule is the first step of the proceeding which leads up to the appointment of a medical referee, and there is no power under s. 14 of the Act of 1923 to appoint a medical referee and no provisions how he shall be appointed. To get those provisions you must turn to paras. (14.) and (15.) of the First Schedule of the Act of 1906 as amended by s. 11 of the Act of 1923, and when you have turned to those provisions to see how the medical referee can be appointed, as it is contemplated he shall be in certain circumstances under the Act of 1923, you will find that it must begin with the service of a certificate of the employer's doctor within six days of

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its date. That was not done in this case; therefore you never brought yourself within para. (*c*) and you have no other ground for diminishing the payment." To which the employer replies: "The provision as to six days in para. (15.) of the First Schedule to the Act of 1906 is not introduced into para. (*c*) of s. 14 of the Act of 1923." That is the question.

I quite agree with what Mr. Cave said, that it can be stated as a short point, but even with the very concise counsel we have had before us it has expanded into dimensions which are rather more than a short point. But in my view I am bound in the way in which I may decide this point by the decision of this Court in the case of *James* v. *Grovesend Steel and Tinplate Co.* (1) In that case the employer gave notice under s. 14 of the Act of 1923 to determine a weekly payment, and sent a copy of his medical practitioner's certificate, but did not send it within six days from its date. The workman desired to say: "You are not under s. 14. You cannot ask for this under s. 14 because s. 14 does not apply to recorded agreements. If there is a recorded agreement you cannot use the procedure under s. 14 to terminate weekly payments." He desired to raise that, but he put in under protest a counter-report of his own doctor. The matter then went on under the procedure which would be followed if a medical referee were to be appointed, but the parties agreed to waive the provision about six days in order that they might get a decision whether s. 14 applied to recorded agreements, and so far there was clearly a question arising under s. 14 for determination, the employer saying that s. 14 applied to recorded agreements, the workman saying that it did not. The Court of Appeal absolutely declined to have anything to do with what s. 14 meant on the subject of recorded agreements. They said that question did not arise. Why did they say it did not arise? They said it did not arise because you have never got into s. 14 of the Act of 1923 at all, because in order to terminate or diminish payment under s. 14, you have to bring yourself within para. (*c*), and to do that you

(1) 18 B. W. C. C. 405.

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must comply with the procedure which is laid down by paras. (14.) and (15.) of the First Schedule to the Act of 1906. Those paragraphs impose the necessity for serving the certificate within six days; there is no jurisdiction, therefore, to go on with the procedure about medical referees at all, unless the notice is served within six days. In my view all three of the learned Lords Justices who decided that case say substantially the same thing: that it is essential before you can take any advantage of the procedure under s. 14 that you have to bring yourself within the procedure leading up to the appointment of a medical referee which is laid down by paras. (14.) and (15.) of the First Schedule; you cannot examine a workman at all except under para. (14.); you cannot get a medical referee appointed except under para. (15.) of the First Schedule to the Act of 1906, and s. 11 of the Act of 1923. Sect. 14 of the Act of 1923 gives no power to appoint a medical referee; you have to look elsewhere for that, and you find the whole procedure leading up to the appointment of a medical referee in paras. (14.) and (15.) of the First Schedule to the Act of 1906, and you must, therefore, comply with that before you can say as an employer: "I have diminished properly the workman's compensation under para. (*c*) of s. 14 of the Act of 1923." That appears to bind me to say that it is a condition of getting into para. (*c*) of s. 14 of the Act of 1923 and of saying: "I have properly diminished the compensation because I have served a certificate with notice and you have not answered it," that you have served the certificate in the time which is contemplated by paras. (14.) and (15.) of the First Schedule to the Act of 1906, because serving the certificate may lead up to the appointment of a medical referee and you cannot appoint a medical referee unless you comply with paras. (14.) and (15.) of the First Schedule to the Act of 1906 and s. 11 of the Act of 1923. That appears to bind me in this case to say that it is a condition precedent of the employer's power to use para. (*c*) of s. 14, that he should have complied with the procedure which may ultimately result in the appointment of a medical referee in certain circumstances.

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I think also I am bound, although in my view *James* v. *Grovesend Steel and Tinplate Co.* (1) is the principal authority, by the decision of this Court in *Davies* v. *Glyncorrwg Colliery Co.* (2) In that case the employer was claiming under s. 14 to discontinue payments to the workman ten days after the day when he served the certificate and notice. The workman did serve a counter-report, but then nobody did anything further, except that the workman went to arbitration. The county court judge found that the workman had entirely recovered on the date of the employer's medical certificate and awarded no compensation payable after that date. The workman appealed, and asked that the payments should be continued till the date of the award. The Court of Appeal reversed the decision of the county court judge, holding that if the employer wanted to stop payments he must bring himself within the provisions of s. 14, which provided that if they wanted to stop payments they must pay the money into court, leaving it to be dealt with by the order of the court, and as they had not paid the money into court, the county court judge, though he found that the workman had recovered on August 14, had no power to deal with the compensation between August 14 when the certificate was dated, and the date when he made the award, and that it was not until the award was obtained that the employer had any right to diminish compensation unless he complied with the provisions of s. 14 and paid the money into court, so that the court could order it to be paid to whichever succeeded on the hearing of the award. Those two decisions, by both of which I am bound, seem to me to lead in this case to the conclusion that the workman should succeed. The employer has diminished the payment from the date when his ten days' notice expired until the date of the award. He did not pay into court and he did not show that he ever got into para. (*c*), because he has not served the certificate within the period after its date required by the provisions of paras. (14.) and (15.) of the First Schedule to the Act of 1906.

(1) 18 B. W. C. C. 405. (2) [1925] 2 K. B. 339.

For those reasons I think that this appeal should be allowed so far as relates to the difference between the partial compensation and the complete compensation from the date ten days after the notice was served until the hearing of the award.

RUSSELL J. After some hesitation I have come to the same conclusion. The difficulty that I felt was that upon the language of s. 14 of the Act of 1923 the proviso never came into operation at all unless the workman did something —namely, served a counter-report; and if that were the true view then the provisions of para. (15.) of the First Schedule to the Act of 1906, which required that the notice should be served within six days, would not have come into play. But on consideration, it seems to me that the true view to take is this: That s. 14 (*c*) of the Act of 1923 is a provision which indicates the first steps to be taken in a procedure which, in the contemplation of the Act, may lead to an order referring the matter to a medical referee. If that is the true view, then I think it is a proper interpretation of the Act to read into that section and to incorporate with that section the provisions of para. (15) of the First Schedule to the Act of 1906.

As regards the decision in the case of *James* v. *Grovesend Steel and Tinplate Co., Ld.* (1), the actual decision there was only this, that the order for reference to the medical referee was an order which had been made without jurisdiction in a case where a workman had in fact served a counter-report and where the employer had in fact not given notice within six days. But I agree with the other members of the Court that the language used by the judges who decided that case indicates quite clearly their view that in order to bring an employer within s. 14 of the Act of 1923, it is essential that he should serve his notice in the first instance and that notice should be served within the six days required by para. (15.) of the First Schedule to the Act of 1906.

For those reasons I agree that the appeal should be allowed.

Appeal allowed.

(1) 18 B. W. C. C. 405.

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Solicitor for the appellant: *Herbert H. Moseley, for Arthur Willey, Hargrave & Co., Leeds.*

Solicitors for respondents: *Vincent & Vincent, for Day & Yewdall, Leeds.*

R. M.

C. A. 1926 *July* 19.

[IN THE COURT OF APPEAL.]

PIRIE *v.* RICHARDSON.

Practice—Judgment—Joint Contract—Claim against joint Contractors for Breach—Separate Defences—Successful Defence pleaded and proved by One only enures for Benefit of All—Rules of Supreme Court, 1883, *Order* XIX., *r.* 15.

The plaintiff sued the defendant R. for damages for breach of a contract entered into by the plaintiff with a firm in which R. was at the time a partner. The partnership had been dissolved before the issue of the writ. The former partners E. and P. were subsequently added as defendants, and each put in a separate defence. P. pleaded and proved that the plaintiff had not on his part complied with the conditions of the contract, and as against P. the action was dismissed. R. and E. did not in their defences raise the plea upon which P. was successful. The trial judge refused leave to R. and E. to amend, and gave judgment against them jointly for the sum claimed. On appeal:—

Held, that inasmuch as the three defendants were joint contractors, the plaintiff had but one and the same cause of action against them all; that the fact established by P., which was common to the whole contract and fatal to any claim upon it, enured to the benefit of the other joint contractors, whether they had pleaded it or not; and that accordingly judgment must be given dismissing the action against R. and E. also.

The principle established in *King* v. *Hoare* (1844) 13 M. & W. 494 and *Kendall* v. *Hamilton* (1879) 4 App. Cas. 504 applied.

APPEAL from Greer J.

In March, 1924, the appellants Richardson and Edleston were carrying on in London the business of foreign exchange brokers in partnership with the defendant Palmer under the style or firm of Edleston, Palmer & Co.

On March 14, 1924, the firm sold to the plaintiff 75,000 francs. The sold note addressed by the firm to the plaintiff was in these terms: "We beg to confirm having sold to you Fcs. 75,000 T.T. on Paris at 110.00—681*l.* 16*s.* 5*d.*, which amount we are instructing . . . . to pay to . . . . for

your amount. Please hand us your cheque for the equivalent 681*l.* 16*s.* 5*d.* value 16th July, 1924. Edleston, Palmer & Co." "T.T." meant telegraphic transfer. Shortly afterwards the partnership was dissolved, and Edleston & Palmer continued until the end of 1924 to carry on business together in a new partnership.

The francs were not in fact delivered in July, 1924, and on October 20, 1924, the plaintiff commenced an action for damages against Richardson alone for failure to deliver the francs, and on December 8, 1924, delivered his statement of claim.

In his defence Richardson (1.) pleaded never indebted; (2.) denied entering into the contract, and alternatively, alleged (3.) that it was a gaming transaction, and (4.) that there had been novation by the plaintiff entering into a new contract on June 23, 1924, with the new firm of Edleston & Palmer, in substitution for the contract sued on.

On July 30, 1925, Greer J. gave leave to amend the writ by adding Edleston and Palmer as defendants, inasmuch as the contract of March 14, 1924, was a contract for and on behalf of the firm and involved a joint liability. Edleston delivered a defence similar to that of Richardson, but omitting the plea of novation. Palmer delivered a defence raising similar defences, but in addition he pleaded that no notice had been sent by the plaintiff in compliance with the contract saying at what place delivery of the francs was to be made.

The action was tried by Greer J. on May 5, 1926. Evidence was given on behalf of Palmer that he had, on the failure of the plaintiff to state where delivery was to be made, written a letter on July 10, 1924, saying that they were prepared to deliver the francs as per period contract against payment of a banker's draft for the sterling amount. Greer J. on the evidence before him found that that letter was written and that it was a custom in this business that there should be a notice sent by the purchaser to the sellers informing them where delivery was to be made, and he found that if no such information or instruction was given, the sellers usually wrote a letter for the purpose of giving notice that

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there had been no such instructions and asking definitely in terms for instructions. He found that Palmer was entitled to take advantage of that letter and therefore that he had complied with all the terms which fell on his part to be performed, and that inasmuch as the plaintiff had not given instructions and Palmer had given a counter-notice, the plaintiff was not entitled as against Palmer to prove that there had been any breach of contract. The learned judge, therefore, gave judgment for Palmer.

With regard to the other two defendants he was not satisfied with the pleas of novation and the Gaming Acts, which in his judgment were not good pleas, and as they put forward no other defence, he gave judgment for 186*l.* 4*s.* 9*d.*, the sum claimed, against them jointly, because as partners they were jointly liable and had failed to excuse themselves, as Palmer had done.

Richardson and Edleston appealed. The appeal was heard on July 19, 1926.

Joy K.C. and *Oddy* for the appellants. This was a joint contract, and the success of the defendant Palmer enures for the benefit of his co-defendants. Order XXVII., rr. 2 and 3, are limited to certain special cases which do not include the present case. Where final judgment is signed against two joint contractors in an action for damages, the plaintiff is precluded from proceeding against the third joint contractor : *Parr* v. *Snell.* (1) The spirit of the decisions in *King* v. *Hoare* (2) and *Kendall* v. *Hamilton* (3) applies to this case, and the plaintiff having failed to prove his case against Palmer, the appellants are entitled to the benefit of it and judgment should have been given for them as well.

Comyns Carr K.C. and *I. G. Kelly* for the respondent. The principle of *King* v. *Hoare* (2) and *Kendall* v. *Hamilton* (3) does not apply to this case. They were cases of merger, and nothing like that has happened here. Only one judgment was given in this action, although the result of it was different

(1) [1923] 1 K. B. 1. (2) 13 M. & W. 494.
(3) 4 App. Cas. 504.

in the case of Palmer from that of the appellants. Palmer asked for instructions from the plaintiff and proved that he got none. It was equally the duty of the appellants to ask for instructions, but they did not do so; and they did not plead the plaintiff's failure to send instructions, which they should have done under Order XIX., r. 15, and they did not ask for leave to amend. The plaintiff made out a prima facie case of default against them. *Phillips* v. *Ward* (1) shows that there must be some limit to the principle of *King* v. *Hoare*. (2) There may be a judgment against a firm which differentiates between the partners, some being included and another excluded; *Lovell & Christmas* v. *Beauchamp* (3), the case of an infant partner. An instance of an apparently inconsistent order occurred in *Smith* v. *Cropper* (4) on a special statute. *In re Robinson's Settlement* (5) shows that where one trustee did not plead the material defence, it is a matter of discretion for the Court whether he can avail himself of the successful plea of his co-trustee. Greer J. exercised his discretion in this case upon the merits, and this Court ought not to interfere with that exercise.

LORD HANWORTH M.R. stated the facts and continued: This is an appeal by the two defendants Richardson and Edleston, who take a point which appears not to have been taken or emphasized before Greer J.—namely, that it was a joint contract under which all three were jointly liable, and that inasmuch as it had been established that Palmer was not liable it was not possible in law to give effect as against the remaining partners to a contract which had already been held to create no liability against one of the partners. I regret that the attention of Greer J. was not called to the point, which is this, that under the principle established in *King* v. *Hoare* (2) and *Kendall* v. *Hamilton* (6) where there is a joint contract there is but one cause of action, and the aggrieved party may sue all the joint contractors

(1) (1863) 2 H. & C. 717.
(2) 13 M. & W. 494.
(3) [1894] A. C. 607.
(4) (1885) 10 App. Cas. 249.
(5) [1912] 1 Ch. 717.
(6) 4 App. Cas. 504.

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or he may sue one of them, but for the purposes of that decision they all stand on the same footing. It was therefore urged by Mr. Joy that in respect of this particular contract it is not consistent with those authorities that there should be an immunity in the case of Palmer and a liability in the case of Edleston and Richardson, because there was one and the same cause of action. To that Mr. Comyns Carr replies that the two other defendants did not take the point which Palmer alone took and which enabled him to succeed, and that the other two defendants are not entitled to make use of the material which Palmer brought to the attention of the Court. The judge considered the question of amendment and refused it. The judge has found that the pleas of two defendants were ineffective and could not be amended, and that only Palmer pleaded the effective plea of which he alone was entitled to have the benefit.

That raises the question what a judge ought to do where there is one cause of action on which the plaintiff relies, and there are three defendants. It is said that Order XIX., r. 15, requires each defendant to take all such grounds of defence as the case may require and as, if not raised, would be likely to take the opposite party by surprise, and that these two defendants cannot rely on something which was not contained in their defence. It is pointed out in one of the cases that surprise is the reason and purpose of that rule. It is also said that the Court ought to act upon the actual facts brought to its attention, although all the parties have not adopted the same or similar pleading. It appears to me in the present case that the plaintiff was relying on a joint contract and not on a several liability.

In the course of the trial attention was drawn to the fact that the plaintiff had failed to establish a liability because he had failed to show that he had performed his part of the contract. No doubt one defendant alone raised that issue, but does that prevent the other defendants from taking advantage of it? Is the Court entitled to give effect to it as against one joint contractor and shut its eyes as against the other joint contractors? According to *In re Robinson's*

Settlement (1) effect ought to be given to the matters which are brought to the attention of the Court and which can be made available by all parties to show that the plaintiff's claim fails. I think that what Buckley L.J. says is of importance: "Order XIX., r. 15, provides that the defendant must by his pleading do various things, but it names no consequence if he does not do those things. It is not confined . . . . to a case where a statute is the thing to be pleaded; it applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising out of the pleadings. Where the defendant ought to plead things of that sort the rule does not say that if he does not the Court shall adjudicate upon the matter as if a ground valid in law did not exist which does exist." It appears to me that that reading of Order XIX., r. 15, which is binding on this Court, indicates that effect ought to be given to a matter which is brought to the attention of the Court even though it has not been so brought by all of the defendants in their pleading. They may not in terms have pleaded the matter, but if there is no surprise and the point is effective for one joint contractor it ought to be effective for the other joint contractors.

Smith v. *Cropper* (2) was brought to our attention, but that was a different case. The Court had to decide whether a patentee had to give particulars. Lord Selborne, speaking of the statute 15 & 16 Vict. c. 83, s. 41, says (3): "The object is that the plaintiff may know what case he has to meet, that he may not be taken by surprise, that he may be informed, if it be a question of novelty, of the place or places at which, and the manner in which, the invention is alleged to have been used or published before the date of the letters patent; and if he has that information from one of two parties who stand together in pari casu, so far as substance is concerned, everything intended and aimed at by the statute has been done; and there can be no reason for saying that evidence which must be allowed to be given in support of the objection

(1) [1912] 1 Ch. 717, 727. (2) 10 App. Cas. 249.
(3) 10 App. Cas. 255.

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so far as relates to the person who has put in the particulars, being so received in a case which is substantially common to both, is not to be attended to as applying to the whole case. . . . . If two parties are sued as partners for infringement as partners in their partnership business, as to whom no separate case is made, or sought to be made, by the plaintiffs, and if one of those partners has put in the necessary particulars, it is obviously for the defence of the case in which he is interested, but which is necessarily common to him and the other; and I am not prepared to hold that the fault or the neglect of the other partner to put in similar particulars, though he does not defend jointly, ought to result in separate judgments against the two." Even if that passage is not actually applicable to the present case, there is reason and good sense in following the intendment of that decision.

By some mistake or failure those who were considering the matter before Greer J. failed to call this particular point to his attention as it has now been put to us. In my judgment the benefit of the point ought to be granted to the other defendants, and the judgment as against all three defendants ought to be the same. For these reasons the appeal will be allowed and judgment entered for all the defendants.

SCRUTTON L.J. This case raises a curious point on which there is not so much authority as I could wish; I have not been able to discover any authority which counsel has not already found. The point is that A. sues B., C. and D. on a joint contract. B., C. and D. are not working together because the partnership has been dissolved. D. puts in a defence applicable to the whole contract, but B. and C. do not. D. proves his defence and thereupon the judge gives judgment for D. on the contract. B. and C. have not pleaded D.'s successful defence and the judge has not allowed them to take advantage of the defence proved by D., their joint contractor, but has given judgment against B. and C. So that on one joint contract there have been judgments that B. and C. are liable, but that D. is not, in a matter not

peculiar to himself and which, if the judge had taken notice of it, would have relieved B. and C. from liability.

The question of joint contractors is wrapped up with a technical rule of law, but one which is far too well established to be interfered with. The rule is stated in *King* v. *Hoare* (1) and in *Kendall* v. *Hamilton* (2) that you can only have one judgment on a joint contract on grounds which apply to the whole contract. Consequently, if A. has got judgment against B., then judgment against C. and D. is merged. A. cannot sue C. and D. because there is no contract to sue on.

As Vaughan Williams L.J. said in *Hammond* v. *Scholfield* (3) and I said again in *Parr* v. *Snell* (4), there cannot be more than one judgment on one entire contract. The foundation of that rule is that you can only have one judgment on a joint contract unless it relates to some matter peculiar to one of the parties, in which event you may have a judgment where D. is not liable, while B. and C. are liable. There is very little authority on the point whether you can have contradictory judgments on a joint contract. Lord Selborne in *Smith* v. *Cropper* (5) uses the picturesque language: "This order is felo de se, it is inconsistent with itself."

A. sues B. and C. on a deed. D. pleads that the deed is a forgery and proves it. C. has not pleaded that it is a forgery. Is the judge bound to give judgment against C.? In *In re Robinson's Settlement* (6) Buckley L.J. thought that the Court would not give judgment upon the deed on the footing that it was a valid deed.

A. sues B. and C. on a joint debt. C. pleads that he has paid the sum due to the authorized agent of A. B. does not know about the facts and does not plead the payment. C. proves that he has paid the authorized agent of A. Is the judge bound to give judgment against B. when he has found as a fact that the sum has been paid under the same contract in the same action? In my view it is merely an application of the principle of *King* v. *Hoare* (1) that there

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) [1891] 1 Q. B. 457.
(4) [1923] 1 K. B. 1.
(5) 10 App. Cas. 249, 259.
(6) [1912] 1 Ch. 717.

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cannot be two contradictory judgments on a joint contract—one to the effect that "You are liable because a sum due on the joint contract has not been paid" and the other to the effect that "You (the joint contractor) are not liable because the sum has been already paid." Such a judgment would stultify the Court.

When the Court has before it a fact common to the whole contract, which is an answer to any claim on the joint contract, it is bound to take notice of that fact as applicable to every joint contractor, whether he has pleaded it or not. Of course that does not include a fact involving statutory illegality which the Courts are bound not to enforce, but it does apply to matters which are not generally illegal and which afford any answer to the claim on the contract.

To go back to Buckley L.J.'s illustration of a forgery—on proof by one of the joint debtors that the deed sued on was a forgery, the Court is not bound, on the assumption that the forgery is not formally pleaded by the other joint debtor, to give judgment against him upon the deed on the footing that it was a valid deed. If there is not enough authority for that proposition, I think that there ought to be one.

In my judgment Greer J. has not taken the proper view in this case. According to the particular allegation by Palmer it was the custom of the trade that when the seller received no information he had to ask for instructions, and that having done so without result, the plaintiff had himself broken the contract and could not recover against Palmer. I think that that was a plea which affected the liability of all the joint debtors and to the benefit of which they were all entitled.

For these reasons I agree that the appeal should be allowed.

ROMER J. I agree. As we are differing with the learned judge I will add a few words. This is an action against joint debtors. Now at one and the same time Greer J. has given judgment against two of the defendants, and has given judgment in favour of the third defendant. No question arises here of illegality or infancy. It is the ordinary case of

there being one cause of action and one only. If, therefore, there was no cause of action against Palmer, as Greer J. has held, there was no cause of action against the other two defendants.

There would, therefore, appear to be some manifest inconsistency in what has been done by the learned judge. The alleged justification for it, as I understand, is that Palmer alone pleaded matter which showed that there was no cause of action, and inasmuch as having regard to Order XIX., r. 15, the other defendants ought to have pleaded the matter and did not, it was not open to them at the trial to rely on it.

That rule has been considered by the Court of Appeal in *In re Robinson's Settlement* (1), where Buckley L.J. says: "The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy." Inasmuch as in that case the other defendants, the joint debtors with the defendant Stevens, had pleaded the Moneylenders Act, so that the plaintiff was not taken by surprise, there was no reason why Stevens should not also rely on the Act, although he had not in terms pleaded it in his defence.

With that decision *Edevain* v. *Cohen* (2) may be compared. There, an action was brought against two people for removal of furniture. At the trial it appeared from the evidence of the plaintiffs that they had recovered judgment in an action against other persons who had joined in the removal. After the evidence for the plaintiffs and for one of the defendants had been taken, the other defendant asked for leave to amend

(1) [1912] 1 Ch. 717, 728. (2) (1889) 43 Ch. D. 187.

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by pleading the judgment, and the first defendant thereupon made the same application. North J. refused the application and was upheld by the Court of Appeal. As A. and B. had not pleaded the judgment in their defence, it might very properly be said that the plaintiff had no notice that it was going to be relied on at the trial. In the present case the plaintiff had full notice that this point was going to be raised and relied upon by Palmer, who referred to it in his defence, and inasmuch as that defence went to the whole root of the matter, I can see no reason why the other defendants should not be entitled to rely at the trial on the matter so pleaded by Palmer.

Solicitors for the appellants: *Maffey & Brentnall.*
Solicitors for the respondent: *Carter & Bell.*

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Oct. 26, 29; *Nov.* 1.

FRANCE FENWICK AND COMPANY, LIMITED *v.* THE KING.

Crown—Ship—Discharge prohibited by Board of Trade during Coal Strike—Detention—Claim for Compensation—Emergency Regulations, 1921, *paras.* 9, 11, 25.

By Regulations made under the Emergency Powers Act, 1920, the Government was empowered to requisition ships, to prohibit the unloading of ships, and to take possession of (inter alia) stocks of coal. The Regulations further made provision for the assessment of "the compensation payable in respect of any property which is requisitioned or of which possession is taken under these Regulations."

During a coal strike in 1921, when the Regulations were in force, the suppliants' vessel arrived in the Thames on April 2 with a cargo of coal for certain consignees. On the same day a Customs officer boarded the vessel, and acting on instructions told the chief officer that "in no circumstances is the vessel to discharge without permission." The vessel accordingly lay with the coal on board till April 21, on which date the Government requisitioned the coal, and on April 22 the vessel was ordered by a Government department to proceed to Erith and discharge there, which she accordingly did, the discharge being completed on April 23.

The suppliants, contending that the vessel had been requisitioned and/or that possession of her had been taken by the Government, claimed compensation under the Regulations, or, alternatively, at common law, for her detention from April 2 to April 23:—

Held, that the word "requisition" in the Regulations meant some effective and positive dominion or control constituted by a definite order given under the Regulations; that no such effective and positive dominion or control was exercised till the vessel was directed to proceed to Erith and discharge her cargo there; and therefore that under the Regulations the suppliants were entitled to compensation in respect of two days only—April 22 and 23.

Held, further, that, assuming that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation, that rule can only apply (if it does apply) to a case where property is actually taken possession of or used by the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government; that a mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, merely because it is obeyed, carry with it at common law any right to compensation; and therefore that the suppliants had no right at common law to claim in respect of the period up to April 22, and as regards the two days—April 22, 23—they could not be in a better position than under the Regulations which superseded any common law right if such otherwise existed.

PETITION OF RIGHT.

The suppliants were the owners of the steamship *Lockwood*, which in March, 1921, brought a cargo of coal from Sunderland consigned to the South Metropolitan Gas Co., and to be discharged at their wharf at Rotherhithe. She arrived on April 2, but, no berth being then available, she was moored at the buoys. A coal strike was then in operation. During the afternoon of the same day a Customs officer named Taylor boarded the *Lockwood*. There was a conflict of evidence as to what he said. The suppliants by paras. 4 and 5 of the petition of right alleged, and by evidence sought to establish, that the Customs officer said that the ship must not discharge her cargo and, when asked by the chief officer whether he could have her boilers cleaned, said that the ship had been requisitioned, and as she might have to go outside the port, she must lie under banked fires. The judge did not accept this evidence, and he found that the only instructions given by the Customs officer were that "in no circumstances is the vessel to discharge without permission." This order was given by virtue of instructions contained in a document headed "Strike Procedure," one paragraph of which required Customs officers to "refuse permission to

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discharge to any collier the discharge of which has not commenced." The *Lockwood* accordingly lay at the Charlton buoys for some time with the coal on board under banked fires. On April 21 the Board of Trade requisitioned the coal on the *Lockwood* under their emergency powers, and on April 22 the vessel was ordered by the Mines Department to proceed to Erith to discharge there. She did so, and the discharge was completed on April 23.

The suppliants contended that the *Lockwood* had been requisitioned, and/or that possession thereof was taken, by the Board of Trade, and that they were therefore entitled, either under the Emergency Regulations, 1921 (1), made under the Emergency Powers Act, 1920, or, alternatively, at common law, to compensation for her detention from April 2 to April 23.

The Crown denied that the suppliants were entitled to compensation.

Sir Leslie Scott K.C. and *Sir Robert Aske* for the suppliants. Even accepting that all that was said by the Customs officer was that "in no circumstances is the vessel to discharge

(1) Para. 9 (1.) of the Emergency Regulations, 1921, empowers the Board of Trade to make orders regulating, restricting, or giving directions with respect to shipping and the ports at which ships are to load or discharge where it is necessary or expedient to do so.

Para. 9 (2.): "The Board of Trade . . . . may, where it appears to the department necessary or expedient for such purposes as aforesaid, by order, requisition or require to be placed at the disposal of the department, in order that they may be used in the manner best suited for the needs of the country any ships . . . . or any rights under any charter . . . . and require ships so requisitioned to be delivered to the department or to any person or persons named by the department at such times and at such places as the department may require."

Para. 11 (2.) empowers the Customs to prohibit the unloading of goods from ships and makes it an offence to unload a ship in contravention of such prohibition.

Para. 13 (1.) enables the Board of Trade to take possession of (inter alia) stocks of coal wheresoever situate and by whomsoever held.

Para. 25 provides for the assessment of "the compensation payable in respect of any property which is requisitioned or of which possession is taken under these Regulations. . . . ."

[The foregoing paragraphs are reproduced in paras. 11, 12, 14 and 31 of the various Emergency Regulations issued in 1926, e.g. those of August 25, 1926.]

without permission," those words involved a requisition of the ship and entitle the suppliants to compensation under para. 25 of the Emergency Regulations. " 'Requisition' is not a term of art. . . . . A requisition is a process by which the State takes the use or the possession of, or the property in, chattels, and sometimes in land. But it is infinitely various. . . . . If a ship is requisitioned it may be requisitioned for the purpose of being sent to sea, or sunk at the mouth of a harbour, or for a purpose which is satisfied the next day " : per Sir Henry Duke Pres. in *The Meandros* (1) ; see, too, per Pickford L.J. in *The Broadmayne* (2), where he said that there was no particular magic in the word " requisition," and that it does not connote the same state of things in every particular case. In *The Sarpen* (3) Pickford L.J. used the same language, and added that " requisition " " means that the Crown has the right to require the services of the ship without the consent of the owner " ; and again in *Bombay & Persia Steam Navigation Co.* v. *Shipping Controller* (4) the same learned judge said that the word at any rate contemplates employment of some sort by the Government for Government purposes. Applying those observations to the present facts, the effect of the instructions given by the Customs officer was to convert the ship into a floating warehouse for the convenience of the Government, so that they could dispose of the coal when and where they saw fit.

[*China Mutual Steam Navigation Co.* v. *MacLay* (5) ; *Sutherland & Co.* v. *Compagnie Napolitaine D'Eclairage, etc.* (6) ; and *Federated Coal and Shipping Co.* v. *The King* (7) were also cited.]

Alternatively, the suppliants are entitled to compensation at common law in respect of the deprivation of their use of the ship, which was kept at the disposal of the Government. An intention to take away property without compensation

(1) [1925] P. 61, 65.
(2) [1916] P. 64, 73.
(3) [1916] P. 306, 317.
(4) (1921) 7 Ll. L. Rep. 226, 227.
(5) [1918] 1 K. B. 33.
(6) (1920) 36 Times L. R. 724.
(7) [1922] 2 K. B. 42.

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is not to be imputed to the Legislature unless it is expressed in unequivocal terms: *Commissioner of Public Works* (*Cape Colony*) v. *Logan* (1); *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co.* (2); *Attorney-General* v. *De Keyser's Royal Hotel* (3); *Newcastle Breweries* v. *The King*. (4)

[*Robinson & Co.* v. *The King* (5) was also referred to.]

Sir Thomas Inskip S.-G. and *Bowstead* for the Crown. The order given by the Customs officer on April 2 that the ship was not to discharge her cargo was a lawful order under the Regulations, and obedience thereto did not amount to a placing of the ship at the disposal of the Government: *Bombay & Persia Steam Navigation Co.* v. *Shipping Controller*. (6) Down to April 21 there was certainly no requisition. On that date, however, a new position arose, for the coal was then requisitioned by the Government. It is submitted, however, that that did not involve a requisition of the ship. No compensation is therefore payable.

Sir Leslie Scott K.C. in reply. The Government could not alter the substance of what they were doing by the form of the instructions given to and by the Customs officer.

Cur. adv. vult.

NOV. 1. WRIGHT J. delivered a written judgment which, after stating the facts, continued as follows: On these facts the suppliants claim to be entitled to be paid for twenty-one days' detention—namely, from April 2, 1921, to April 23, 1921—either under para. 25 of the Emergency Regulations, 1921, or at common law. These Emergency Regulations were issued on April 1, 1921, by reason of the then existing coal strike, and were made under the authority of the Emergency Powers Act, 1920. It is not contended that they were in any way invalid. Under them the Board of Trade were empowered, where it appeared necessary by reason of the existing emergency, to take possession of various stores, road transport, coal mines, coal, and other things and places

(1) [1903] A. C. 355.
(2) [1919] A. C. 744, 752.
(3) [1920] A. C. 508.
(4) [1920] 1 K. B. 854.
(5) [1921] 3 K. B. 183.
(6) 7 Ll. L. Rep. 226.

specified; but the Regulations also dealt with matters connected with shipping, in particular by paras. 9, 11, and 25. The dispute, so far as concerns the Regulations, turns on those paragraphs. The suppliants' original contentions were based on the allegations set out in paras. 4 and 5 of the petition, but I indicated that I was not likely to find these paragraphs proved, and Sir Leslie Scott in a strenuous argument contended that I should hold the order to discharge given on April 22, 1921, constituted a requisition and requirement within para. 9 (2.), giving a claim to compensation pro tanto under para. 25, and that, equally, the earlier period when the ship was lying under banked fires waiting permission to unload came under the same sub-paragraph. I did not gather that he relied specifically on para. 9 (1.). He contended that while the ship was waiting at the buoys she was in substance being kept by the Board of Trade at their disposal, that the Board had determined to take the cargo and intended to keep the ship with the cargo on board at their disposal, so that at any moment at their convenience they could order her to go and discharge where they desired, and, meantime, that the ship was a floating warehouse for the cargo, potentially, if not actually, belonging to the Government—a floating warehouse kept with main steam and full crew ready at any moment when the Board of Trade ordered her to go and discharge. Whatever words Taylor used, he meant, it was contended, and the Board of Trade meant and were understood to mean, that the ship was being ordered to keep the coal on board for the benefit of the Board of Trade, to stay where it was, awaiting further instructions and to be ready to act on such instructions whenever received. In this sense, it was contended by Sir Leslie Scott, the ship was required to be placed, and was placed, at the disposal of the Board of Trade. On the other hand, the Solicitor-General, for the Crown, contended, though I think he did not press the point as regards the days, April 22 and 23, 1921, that the vessel merely acted on directions to discharge, given under para. 9 (1.), and was never requisitioned under para. 9 (2.) so as to give a claim under para. 25. He contended,

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as regards the period up to April 22, 1921, that nothing was done by the Customs or the Board of Trade during that period, except to give purely negative orders—namely, that the cargo was not to be discharged—and that these orders were justified by para. 11 (2.), even if by reason of the orders the ship must wait where she was; this however was but the fact that she could not leave without getting from the Customs an indorsement on the transire or the pass, which was all she would have needed by way of clearance, being a coastwise vessel. That circumstance, it was argued, however convenient to the Board of Trade, resulted from collateral matters and not from any order given under the Regulations.

A number of cases were cited, and I shall refer to them later. I think it better first to state the conclusion at which I have arrived on the construction of these Regulations. Para. 25 provides for compensation in respect of property the possession of which is taken under the Regulations, that is, under various paragraphs, such as para. 13 (1.) (*d*) "coal," which do not concern this question, and also in respect of property requisitioned. The word "requisition" seems to be elsewhere used only in para. 9 (2.), where it is coupled with the words "require to be placed at the disposal of the department." These latter words are, I think, inserted either by way of definition or amplification of the word "requisition" as used in para. 25, where also some of the provisions with regard to road vehicles, etc., may be included. "Requisition" so used in para. 25 means, in my judgment, some effective and positive dominion or control constituted by a definite order given under the Regulations. Thus, the order to proceed to Erith and discharge constituted such a requisition. The vessel no doubt remained in the possession of the suppliants by their master and crew, but she was required to be placed, and was placed, at the disposal of the department; she was performing the service which the department ordered. The position is, in my judgment, different whilst she was merely prohibited from unloading under para. 11 (2.). She was then not performing any

service on the orders of the Government. There was no act which the owners were required to do or service to render. In effect, to attempt to unload the ship while under the prohibition, the validity of which is not questioned, would simply be to do an unlawful act, and it cannot have been intended that compensation would be paid to subjects for abstaining from doing unlawful acts. It is immaterial, in my opinion, that the ship waited where she was and was in fact available to discharge whenever and wherever the department required her. That was merely a collateral consequence. Indeed, the Government might never have needed the coal or taken possession of it or given any orders to the ship; the strike might have suddenly ended and the emergency passed, or the coal might have been purchased by a voluntary arrangement from the consignees and voluntary arrangements made as to unloading. Whether there was a requisition depends, in my judgment, on the nature and quality of the order given, and not on collateral considerations. It was not, I think, contended by Sir Leslie Scott that the order not to unload was a direction within para. 9 (1.). I do not think it was, nor do I think any direction under para. 9 (1.) could in itself amount to a requisition. To amount to a requisition the direction must, I think, also come within para. 9 (2.) and amount to a requirement that the vessel be placed at the disposal of the Government. On the Regulations I hold that the suppliants are entitled to compensation for the two days, April 22 and 23, 1921, but for no other days claimed.

I think this conclusion is also in accordance with the cases cited. The word "requisition" appears from the Oxford Dictionary to have been adopted from the French, and as early as 1837 was used by Carlyle as meaning "to require anything to be furnished for military purposes." It came, however, into official prominence during the Great War and, in particular, was employed in the Proclamation by the Admiralty dated August 3, 1914, in connection with the requisition and taking up of British vessels; it was employed in several of the War Emergency Regulations, especially

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art. 39 B B B, and in the Indemnity Act, 1920, s. 2, sub-s. 1, and Schedule, Part I. The nature of the requisition of vessels under the Admiralty Proclamation was explained by Pickford L.J. in *The Broadmayne* (1) and in *The Sarpen*. (2) The same great judge, when Master of the Rolls, again discussed the meaning of the word in *Bombay & Persia Steam Navigation Co.* v. *Shipping Controller*. (3) He was dealing with the word as used either in the Admiralty Proclamation or the War Emergency Regulations or the Indemnity Act of 1920—it does not appear which—and he there said that the word at any rate does contemplate employment of some sort by the Government for Government purposes. He obviously would regard as a requisition a case where the Government having taken possession of a cargo kept it in the ship at their disposal, but he held that in the contest before him a mere direction to the ship to proceed to a particular port, the order being assumed to be lawful, did not constitute a requisition. *Federated Coal and Shipping Co.* v. *The King* (4) mainly turned on the circumstance that if there had been a requisition it was a requisition from the owners, whereas the suppliants there were merely time charterers, but Bailhache J. seemed to assume that if a ship were ordered to lie in a port at the Government's disposal, such order being lawful, that would be a case not of requisition but of mere direction. The point, however, was not material, and whilst it may be that a mere direction would be different from a requisition, a direction that the ship should be at the disposal of the Government would, I think, be a requisition as that term is used in para. 9 (2.) of the Emergency Regulations, 1921, or in art. 39 B B B of the War Emergency Regulations. That article was discussed by the Court of Appeal in *Sutherland & Co.* v. *Compagnie Napolitaine D'Eclairage, etc.* (5) The steamer in that case had been directed to proceed to an Australian port and there load a cargo of grain for the United Kingdom for the British

(1) [1916] P. 64, 73.
(2) [1916] P. 306, 317.
(3) 7 Ll. L. Rep. 226.
(4) [1922] 2 K. B. 42.
(5) 36 Times L. R. 724.

Government. That was held to constitute a requisition within the meaning of the charterparty, which provided for a suspension of the charter period during the requisition. The ship was so directed under art. 39 B B B, which is in practically identical terms with para. 9 of the Emergency Regulations, 1921. The members of the Court of Appeal did indeed abstain from giving any formal definition of the word "requisition," but I think their judgments support the conclusion that a direction to proceed to a place and load or discharge a cargo for the Government amounts to a requisition in the sense of the Regulations. I cannot find it suggested, still less decided, in any case, that a mere direction by the Government to a ship to go to a place, or, a fortiori, a mere negative direction, such as not to unload without permission, can constitute a requisition or a requirement that a vessel should be placed at the Government's disposal within such a Regulation as the present.

I do not need to consider at any length the claim based on the common law right to compensation for interference with a subject's property. In the cases cited in argument the matter has been discussed by high judicial authority, and I do not think it necessary to express any opinion of my own, but I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. I think, however, that the rule can only apply (if it does apply) to a case where property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State. Hence, I think, there is no right at common law which the suppliants in this case can claim in respect of the period up to April 22, 1921; and as regards the two days, April 22 and 23, 1921, the suppliants cannot be at common law in a better position

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than under para. 25 of the Emergency Regulations, which indeed, in my opinion, has superseded any common law right, if such otherwise existed.

I am only asked to deal with the question of liability, and the result, therefore, is that I declare that the suppliants are entitled to recover the proper amount in respect of the two days, April 22 and 23, 1921, but are not entitled to recover in respect of any further or other period.

Judgment accordingly.

Solicitors for suppliants: *Botterell & Roche.*
Solicitor for Crown: *Solicitor to Board of Trade.*

J. S. H.

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July 14.

[IN THE COURT OF APPEAL.]

THE KING *v.* COPESTAKE.

Ex parte WILKINSON.

Bastardy—Order—Adjudication of Paternity—Payment of periodical Sum—Fresh Evidence rebutting Paternity—Application for Revocation—Jurisdiction of Justices—Criminal Justice Administration Act, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 30, *sub-s.* 3.

After a bastardy order had been made against the appellant by the justices in petty sessions adjudging him to be the putative father of a seven months child, and ordering him to pay a weekly sum, he sought to obtain a revocation of the order under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, by adducing fresh evidence to show that the child was a full-time child at birth, thus placing the act of coition two months earlier than the date alleged by the mother. The justices refused his application:—

Held, by the Court of Appeal, that s. 30, sub-s. 3, of the Act, while giving a court of summary jurisdiction power to revoke or vary a bastardy order made by it so far as that order related to periodical payments, conferred no jurisdiction on that court to revoke the order so far as it contained an adjudication of paternity.

Colchester v. *Peck* [1926] 2 K. B. 366 approved.

Observations on the meaning of "fresh evidence."

APPEAL from the Divisional Court.

On April 7, 1925, a girl gave birth to a child, and on May 29, 1925, she applied for a bastardy order against the appellant

Wilkinson, alleging that he was the father of the child; that intercourse had taken place between them on August 4, 1924; that that was the first occasion, and that the child was a seven months child. The appellant was prepared to admit that he had had connection with the girl towards the end of August, 1924. Upon that application the justices adjudged him to be the putative father of the child, and they made an order on him to pay 10*s.* a week until the child was fourteen years of age, and also 1*l.* 10*s.* the expenses at birth and costs.

Subsequently, the appellant alleged that since the date of the order he had learned from the nurse and doctor who attended the girl's confinement that the child was a full-time child when born, which would necessarily put the act of coition two months earlier.

On October 2, 1925, an application was made by the mother on the ground that the appellant had not made the payments under the order, and then the appellant applied to the justices, under the provisions of s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, for a variation of their order, or that it should be set aside, on the ground that there was fresh evidence of the nurse and doctor which would establish that it was a full-time child at birth. The justices took time to consider the case, and a fortnight afterwards refused to set aside the order made by them.

On November 4, 1925, there was a further summons against the appellant for non-payment of the weekly sum, and then his counsel again asked that the matter should be reopened on the fresh evidence, but the justices again refused to consider the matter.

In February, 1926, the appellant applied to the Divisional Court and was granted a rule nisi for a mandamus against the justices, but on May 4 the Divisional Court discharged the rule, stating that they would follow their own decision in *Colchester* v. *Peck* (1) to the effect that s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, did not

(1) [1926] 2 K. B. 366; 135 L. T. 32.

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enable the justices to vary that part of the order which consisted of the adjudication of paternity.

The appellant appealed. The appeal was heard on July 14, 1926.

Bertram Long for the appellant. The justices have power to make a bastardy order under s. 4 of the Bastardy Laws Amendment Act, 1872, after hearing evidence which satisfies them that the man is the putative father. They may adjudge him to be the putative father and they may order him to pay a weekly sum. That order for periodical payment may, upon fresh evidence, be revoked, revived, or varied under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914. In the present case, such an order had been made; there was fresh evidence, and the justices had jurisdiction to revoke the order, and they ought to have heard the evidence and exercised their jurisdiction. The evidence went to show that the man could not have been the father of the child.

Except in *Dodd* v. *Dodd* (1), which would have involved the consideration of s. 30, sub-s. 3, if the case had not gone off on another point, there has been no judicial consideration of s. 30, sub-s. 3, until *Colchester* v. *Peck* (2), which does not bind this Court.

Sect. 37, sub-s. 2, of the Criminal Justice Administration Act, 1914, provides for an appeal to quarter sessions from "any" order made by a court of summary jurisdiction under the enactments relating to bastardy; those words are unrestricted and cover the whole order and not merely the part dealing with periodical payments; and the sub-section goes on to include an appeal from the revocation of such an order. That implies that the justices in petty sessions have themselves power to revoke any such order. No distinction is drawn between the component parts of the order. This construction is supported by the definition of "affiliation order" in s. 7 of the Affiliation Orders Act, 1914, as meaning an order under the Bastardy Laws Amendment Act, 1872,

(1) [1920] 1 K. B. 71. (2) [1926] 2 K. B. 366; 135 L. T. 32.

adjudging a man to be the putative father and ordering him to pay a weekly sum. No distinction is there made between the adjudication and the order for payment of a periodical sum.

Whether the justices had power or not to revoke the order of adjudication of paternity, they had power to suspend it, and they had power, upon being satisfied by fresh evidence, to revoke the order for periodical payment. The appellant desires to have an order revoking the order for periodical payment, whether the basis of it, the adjudication of paternity, is revoked or not. The justices had power to free the appellant from the future liability; they had jurisdiction to do so, and they ought to exercise that jurisdiction if satisfied on the evidence which they should have admitted.

There is fresh evidence in this case which comes within the limits laid down in *Timmins* v. *Timmins* (1) and *Johnson* v. *Johnson*. (2) The appellant was not ready with the evidence of the nurse and doctor on the original application, as he was not aware that the girl intended to allege a short-time child.

J. F. Eales for the respondent justices. This case is covered by the decision in *Colchester* v. *Peck*. (3) The legislature could never have intended that the justices in petty sessions should have power to revoke their own order of adjudication of paternity.

LORD HANWORTH M.R. This case raises a point which at first sight is a little puzzling—namely, whether under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, an application can be made to vary an order made by justices on fresh evidence as to paternity. [His Lordship stated the facts and continued:] It is said that the order of May 29, 1925, was for the periodical payment of a sum to this girl. Sub-s. 3 of s. 30 of the Criminal Justice Administration Act, 1914, provides that: "Any order made either before or after the commencement of this Act by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction

(1) [1919] P. 75. (2) [1900] P. 19.
(3) [1926] 2 K. B. 366; 135 L. T. 32.

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of the court, be revoked, revived, or varied by a subsequent order." It is claimed that in this case such an order was made, that there was fresh evidence, and that on that fresh evidence there was power for the court to revoke the order they made for payment, and that, therefore, there was a jurisdiction which ought to have been exercised by the justices to hear the fresh evidence.

In support of that claim the appellant contends that sub-s. 2 of s. 37 provides for an appeal to quarter sessions from an order such as this and also from any refusal by a court of summary jurisdiction to make an order under the enactments relating to bastardy, or from the revocation, revival, or variation by a court of summary jurisdiction of such an order, and he says that that sub-section contemplated the revocation by a court of summary jurisdiction of a bastardy order in its entirety, and not merely of that part of the order which related to a periodical payment. That may be a plausible argument, but I have come to the conclusion that in *Colchester* v. *Peck* (1) the Divisional Court came to a right decision in holding that s. 30, sub-s. 3, of the Act did not enable the justices to vary that part of their order which contained an adjudication of paternity.

A bastardy order is made under the powers for that purpose given by s. 4 of the Bastardy Laws Amendment Act, 1872, which provides, in the first place, that on evidence being given the justices may adjudge the man to be the putative father, and, having so adjudged, the section proceeds: "and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother . . . . of a sum of money weekly, ... for the maintenance and education of the child, and of the expenses incidental to the birth of such child." By s. 9 of the same Act, on appeal to quarter sessions against any order made under that Act, there is power, if thought fit, to reduce the amount directed to be paid. There are three things of importance to be observed in that Act of 1872, first, the duty of the justices

(1) [1926] 2 K. B. 366; 135 L. T. 32.

after hearing evidence which satisfies them to adjudge that the man was the putative father of the child; secondly, they have power when they have so adjudged, to order him to pay a periodical sum; and thirdly, quarter sessions have power to reduce the amount ordered to be paid.

When the Criminal Justice Administration Act, 1914, was passed it dealt, by s. 30, with the periodical payments of money, and it established the practice that such payments could be made through an officer of the court or any other person specified in the order, and by sub-s. 3 it provided that any such order for the periodical payment of money might, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order.

But the adjudication that Wilkinson was the putative father of the child was not an order for a periodical payment, and, therefore, although sub-s. 3 should be construed in a wide sense, it is not necessary that it should be held to include the revocation of the order of adjudication. That view of the interpretation of sub-s. 3 is upheld, or made clearer, by sub-s. 5, which provides that nothing in s. 30 shall prejudice or affect the powers and duties of courts of summary jurisdiction under the Affiliation Orders Act, 1914. By s. 7 of the Affiliation Orders Act, 1914, "affiliation order" means an order made under the Bastardy Laws Amendment Act, 1872, or any Act amending the same, adjudging a man to be the putative father of a bastard child and ordering him to pay a sum of money, weekly or otherwise, to the mother of the bastard child or to any other person who is named in the order. There is used, therefore, in an Act passed a few days before the Criminal Justice Administration Act, 1914, an express term, "affiliation order," which combines in its meaning both the adjudication of a man as the putative father and an order for payment by him of a weekly sum, but both those elements are not included in sub-s. 3 of s. 30. Therefore for the reasons given by the Lord Chief Justice in *Colchester* v. *Peck* (1) sub-s. 3 of s. 30 of the Criminal

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Justice Administration Act, 1914, is not so wide as to allow of the revocation of an order of adjudication that the man was the putative father. If the words of revocation in sub-s. 3 of s. 30 are confined to the periodical payment of money and are not interpreted to refer also to the order of adjudication, full effect will have been given to the words used in the sub-section. For the reasons given by Avory J. in the Divisional Court I think that sub-s. 3 of s. 30 cannot be interpreted by reference to sub-s. 2 of s. 37 of the same Act.

On the main point I agree that the decision of the Court of King's Bench was right and that this appeal must be dismissed.

That seems enough to dispose of the case, but I will say a word upon the subject of fresh evidence. In *Timmins* v. *Timmins* (1) Hill J., founding himself on *Johnson* v. *Johnson* (2), said that this term fresh evidence "means evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing, and could not by reasonable means have come to his knowledge before that time." There is another passage in *Brown* v. *Dean* (3), where Lord Loreburn L.C. said: "When a litigant has obtained a judgment in a Court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive." That statement was not accepted by Lord Shaw, but the other learned Lords agreed with the Lord Chancellor, and the result of it would be that only such fresh evidence could be produced as would satisfy those conditions. That evidence must be of such a character that not merely is it relevant but of such importance that it would have affected the judgment of the tribunal if it had been before them at the original hearing of the case. For my own part I am not satisfied that there was fresh evidence

(1) [1919] P. 75, 80. (2) [1900] P. 19.
(3) [1910] A. C. 373, 374.

in this case, because it seems to me that if Wilkinson had been alert in the matter of the evidence given on his behalf before the justices at the hearing, he might have put forward the evidence which he says he has now obtained. But I need not decide that point, as I agree with the conclusion of the Divisional Court on the main question.

SCRUTTON L.J. My mind has fluctuated during the course of the arguments, as, I gather, did the minds of two of the judges in *Colchester* v. *Peck.* (1) [His Lordship stated the facts and continued:] The question on this appeal turns upon s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914. That section deals with several matters concerning periodical payments, and sub-s. 3 provides that any order made by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order. The appellant says: "I desire this order for a periodical payment of money to be revoked, because the fact upon which it was founded is not true, and I desire to prove that by fresh evidence."

Sect. 4 of the Bastardy Laws Amendment Act, 1872, is in two parts. The first is: "the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child." That is the first stage, and the order which is drawn up is that the man is adjudged to be the putative father. Then comes the second stage: "and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child," of a sum of money weekly. Upon that the justices, if they see fit, make the second part of the order, for payment of a

(1) [1926] 2 K. B. 366; 135 L. T. 32.

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weekly sum; the first part of the order being an adjudication of paternity. When the summons is dismissed for want of sufficient evidence it is treated as a normal suit, and there are decisions which show that the mother may repeat her application within the twelve months from the birth, and there are also decisions which show that when the matter is tried out on its merits and the justices give their decision, then that decision is final, subject to an appeal to quarter sessions to reduce the amount directed to be paid.

Now if that were the position before 1914, one would expect that you could call in question both parts of the order, both the adjudication and the amount of payment. In the case of a married woman who has obtained an order for periodical payments under the Summary Jurisdiction (Married Women) Act, 1895, the legislature provided by s. 7, that a court of summary jurisdiction might upon the application of the husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, upon proof of adultery by the wife. But in the present case the legislature has not made any corresponding provision for the revocation of the whole order. It is said that the order for payment may be revoked or varied by a subsequent order; but if the legislature were dealing with the final decision as to paternity and meant that in future it could be reopened, it should have said so, and I think we ought not so to hold unless there is a clear enactment to that effect.

It has also been argued that s. 37, sub-s. 2, of the Act of 1914 is not consistent with that view. That sub-section provides for appeals to quarter sessions from any order made by a court of summary jurisdiction under the enactments relating to bastardy, or from any refusal by such a court to make such an order, or from the revocation, revival, or variation by a court of summary jurisdiction of such an order. If s. 37, sub-s. 2, does not give any appeal except from the orders therein mentioned, it may have been a casus omissus, but I think that the justices were right in deciding

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that they had no jurisdiction to revoke the order as to the paternity.

If, however, the justices had been entitled to reopen the question of paternity, then I think I should have held that there was fresh evidence of a kind enabling them to do so. In *Nash* v. *Rochford Rural Council* (1) the question of admission of fresh evidence was before this Court, and we followed the rule laid down by Lord Chelmsford in *Shedden* v. *Patrick* (2), and stated it in much the same way as Hill J. stated it in *Timmins* v. *Timmins* (3), to the effect that the evidence to be admitted must be of such importance as very probably to influence the decision. It seems to me that we in this Court have not got so far as the full extent of Lord Loreburn's dictum in *Brown* v. *Dean* (4) that the new evidence must be of such a character that it is "presumably to be believed, and if believed would be conclusive," but I think we have clearly decided that it must be of such weight as, if believed, would probably have an important influence on the result.

I agree that the appeal should be dismissed.

ROMER J. I think that on the question of construction of the Act, and for the reasons given in the judgments just delivered, the Divisional Court came to a correct conclusion, and therefore it is not necessary for me to express any opinion on the question of fresh evidence. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *J. Tickle & Co., for H. M. Smith, Derby.*

Solicitors for respondents: *Peacock & Goddard, for Moody & Woolley, Derby.*

(1) [1917] 1 K. B. 384.
(2) (1869) L. R. 1 H. L. Sc. 470, 545.
(3) [1919] P. 75.
(4) [1910] A. C. 373, 374.

R. M.

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THE KING *v.* SMITH AND OTHERS, JUSTICES OF NORFOLK.

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Rating—Sewer Rate—Distress—Expenses of Distress—Costs and Charges of making, keeping and selling Distress—Items and Amounts recoverable—Consistency of earlier and later Acts—Implied Repeal—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *Schedule—Distress (Costs) Act,* 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Sewers Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 22), *s.* 55—*Sewers Act,* 1849 (12 *&* 13 *Vict. c.* 50), *s.* 7.

The provisions of the Distress (Costs) Act, 1817, as applied by the Distress (Costs) Act, 1827, to distresses for sewer rate are not superseded and rendered inoperative by the Sewers Act, 1833, s. 55, or the Sewers Act, 1849, s. 7; and, consequently, in the case of a distress for drainage rate in respect of an amount not exceeding 20*l.* it is illegal to make any charge for the expenses of the distress in excess of the scale given in the Schedule to the Distress (Costs) Act, 1817.

Coster v. *Headland* [1906] A. C. 286 applied.

Hill v. *Pannifer* [1904] 1 K. B. 811 referred to.

RULE NISI for an order in the nature of a mandamus.

By provisional orders made under the Land Drainage Acts, 1861 (24 & 25 Vict. c. 133), and 1918 (8 & 9 Geo. 5, c. 17), and confirmed respectively by the Land Drainage (Ouse) Provisional Order Confirmation Act, 1920 (10 & 11 Geo. 5, c. cxxii.), and the Land Drainage (Ouse) Provisional Order Confirmation Act, 1925 (15 & 16 Geo. 5, c. lxxii.), the area drained by the River Ouse and its tributaries was declared to be a drainage district, and superintendence of the matters relating to drainage within the district was vested in the Ouse Drainage Board, who by s. 67 of the Act of 1861 could exercise within their district all the powers of Commissioners of Sewers, including the power given to Commissioners by s. 38 of that Act of levying rates, and who could form a court of sewers.

The applicant, Joseph Porter, was the occupier of a farm called Grange Farm, Feltwell, and of other land at Methwold, in the county of Norfolk and within the district of the Ouse Drainage Board.

In 1924 the Board made a drainage rate, to which the

applicant was assessed both on his land at Feltwell and on his land at Methwold.

On March 13, 1925, the applicant attended at the court of the Board on a summons to show cause why he had not paid the sums assessed upon him, and he thereupon paid the sum assessed on him at Feltwell, but refused to pay the sum assessed at Methwold—namely, 4*l.* 16*s.* 11*d.* Eventually, on March 23, 1926, the Board issued a warrant against the defendant to levy the latter sum and the costs and expenses of obtaining and executing the warrant by distress and sale of his goods, and instructed one of their bailiffs, Thomas F. Harrington, who resided near Cambridge, to execute the warrant.

On the same day the bailiff accordingly, with an assistant, went by train from Cambridge to Brandon and by motor from Brandon to Grange Farm, Feltwell, seized a horse belonging to the applicant, took it by road to Brandon, and stabled it there for the night, and next day he took the horse by train to Cambridge and stabled it there until March 29, 1926, when it was sold there for 10*l.* The Board claimed from the applicant 12*l.* 19*s.* 1*d.*, and retained the proceeds of the sale of the horse in part satisfaction thereof. That amount comprised the said 4*l.* 16*s.* 11*d.* for rates and 8*l.* 2*s.* 2*d.* for expenses. The latter sum was made up of the following items: Cost of warrant, 5*s.*; levy fee, 5*s.*; man in possession, 6*s.*; two return fares Cambridge to Brandon, 15*s.* 8*d.*; conveyance of bailiff and man from Brandon to Feltwell, 1*l.*; one night's stabling at Brandon, 3*s.* 6*d.*; bailiff's expenses, 6*s.* 6*d.*; horse-box from Brandon to Cambridge, 13*s.*; stabling at Cambridge, 3*l.*; printing bills of sale, 7*s.* 6*d.*; and auctioneer's fees, 1*l.* The applicant admitted the following items: Levy fee, 3*s.*; man in possession, 5*s.*; printing bills of sale, 7*s.* 6*d.*; and auctioneer's fee, 10*s.*, amounting together to 1*l.* 5*s.* 6*d.*; but alleged that the balance of the expenses claimed, namely, 6*l.* 16*s.* 8*d.*, was excessive.

On May 26, 1926, the applicant made a complaint before the justices: That Thomas F. Harrington . . . . on the 23rd day of March, 1926, at Feltwell aforesaid then being

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employed to make a distress upon the goods and chattels of him the said Joseph Porter for and in respect of arrears of taxes alleged to be due to the Ouse Drainage Board not exceeding in amount the sum of 20*l.*, to wit the sum of 4*l.* 16*s.* 11*d.*, did make such distress accordingly and afterwards between the said 23rd day of March and the 22nd day of April, 1926, unlawfully did retain take and receive from him the said Joseph Porter out of the produce of the goods and chattels so distrained upon certain charges other than and exceeding in amount the respective costs and charges allowed by the Distress (Costs) Act, 1817 (1), and the Distress (Costs) Act, 1827 (1), that is to say the sum of 6*l.* 16*s.* 8*d.* for alleged fees and expenses.

On June 1, 1926, when the complaint was called on for

(1) Distress (Costs) Act, 1817, s. 1: ". . . . no person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of twenty pounds for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule hereunto annexed and appropriated to each act which shall have been done in the course of such distress."

. . . . .

"*Schedule of the limitation of costs and charges on distresses for small rents:—*

	l.	*s.*	*d.*
Levying distress	0	3	0
Man in possession, per day	0	2	6
Appraisement, whether by one broker or more, sixpence in the pound on the value of the goods.			
Stamp, the lawful amount thereof.			
All expenses of advertisements, if any such ..	0	10	0
Catalogues, sale and commission, and delivery of goods, one shilling in the pound on the net produce of the sale."			

The Distress (Costs) Act, 1827, provides that all the provisions of the Act of 1817 shall extend to any distress or levy which shall be made for, (inter alia), any poor's rates or sewer rate where the sum demanded and due for such rates shall not exceed 20*l.*

The Sewers Act, 1833, s. 55, provides: "In all and singular the orders, decrees, or other proceedings hereafter to be made touching or concerning any matter or thing within the jurisdiction of any Court of Sewers, it shall and may be lawful to and for any such Court of Sewers to order and decree that the costs, charges, and expenses

hearing before the justices, it was submitted to them on behalf of the bailiff that they had no jurisdiction to hear the said complaint, and the justices thereupon ruled that they had no jurisdiction to hear the complaint and declined to hear it.

The applicant obtained a rule nisi calling upon the justices to show cause why they should not proceed to hear and determine the complaint, the terms of which were set out in the rule nisi, on the ground that they had jurisdiction to hear it and nevertheless declined jurisdiction; and notice of the rule nisi was given to the justices or any two or more of them, and to the said T. F. Harrington.

Montgomery K.C. and *Gerald Howard* showed cause. The justices should not be ordered to hear and determine the complaint. They rightly declined to hear it inasmuch as they had no jurisdiction to do so. There is no ground for the contention of the applicant that the charges made by the drainage board in respect of the distress were unlawful as being in excess of the amount allowed by statute.

It is true that the Distress (Costs) Act, 1817, s. 1, provided that no person making any distress for rent, where the sum demanded and due should not exceed 20*l.*, should have take or receive out of the goods distrained upon and sold more costs or charges for or in respect of such distress, or any matter or thing done therein than such as were fixed in the Schedule thereto; and that the Distress (Costs) Act, 1827,

of and incidental to the making and putting in force such order or decree . . . . shall be paid and borne by the person . . . . upon or against whom . . . . such order or decree shall respectively be made, which costs, charges, and expenses shall and may be ascertained and settled by or by the authority of any such Court of Sewers," and may be levied and raised by distress.

The Sewers Act, 1849, s. 7, provides (inter alia) that it shall be lawful for Commissioners of Sewers, on proof of non-payment of sewer rates by any person, "to issue their warrant to levy the said sum or sums, and also the costs and expenses incurred in obtaining such warrant . . . . and in executing the same, by distress and sale of the goods and chattels of such person; and the overplus arising from the sale of such goods and chattels, after satisfying such sum of money and costs, and the expenses of the distress and sale, shall be returned, on demand, to the party whose goods have been distrained. . . . ."

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s. 1, provided that all the provisions in the Act of 1817 should extend with respect to any distress for (inter alia) any sewer rate or any other rates, taxes, impositions or assessments whatever where the sum demanded and due should not exceed 20*l.* It is further true that here the sum for which the distress was made was demanded in respect of sewer rate, that it did not exceed 20*l.*, and that the charges exceeded the amounts fixed in the said Schedule, and therefore if these enactments remained in force it may be that they would apply to this case.

These enactments, however, as regards the costs and charges of distress for sewer rate, have been in effect repealed by subsequent legislation. The Sewers Acts Amendment Act, 1833, s. 55, provides that in all the orders, decrees or other proceedings concerning the jurisdiction of any court of sewers, it shall be lawful for any such court to order and decree that the costs, charges and expenses of and incidental to the making and putting in force such order or decree shall be paid and borne by the person against whom such order or decree shall be made, which costs, charges and expenses shall and may be ascertained and settled by any such court and may be levied by distress. That section gives to the court of sewers the unrestricted right to deal with the costs both of making and also of enforcing by distress or otherwise any order of that court. In the present case the court by which the warrant of distress was issued was a court of sewers, the warrant of distress was an order of that court, and in so far as it directed payment of costs an order for costs, within the meaning of that section. The Sewers Act, 1849, declares by its preamble that it is expedient that further provision be made for making and enforcing payment of sewer rates; and provides by s. 7 that it shall be lawful for the Commissioners of Sewers on proof of non-payment of sewer rates by any person to issue their warrant to levy the sum and also the costs and expenses incurred in obtaining the warrant and in executing it by distress and sale of his goods; and that the overplus from the sale after satisfying such sum and costs and the expenses of the distress and sale shall be returned

to him. In the present case the drainage board, who have all the powers of the Commissioners, were entitled under that section to issue a warrant for the costs of obtaining the warrant and of executing it by distress, and only the overplus after satisfying these amounts can be recovered by the applicant. These provisions of the Acts of 1833 and 1849 give to the drainage board a right to order that the costs of obtaining as well as the costs of executing a warrant of distress for sewer rate shall be levied on the goods of the ratepayer. They further give to the board an unlimited right to fix the amount of these costs. They are therefore inconsistent with and repugnant to the provisions of the earlier Acts of 1817 and 1827, which relate only to the costs of making the distress and which fix precisely the amount of these costs.

In *Coster* v. *Headland* (1) it was no doubt held as regards the costs of a distress for poor rate that the two older Acts were not inconsistent with and therefore not repealed by the Distress for Rates Act, 1849, s. 1. That case, however, is distinguishable from the present case inasmuch as there the later Act merely contained a general provision for awarding costs, whereas the later Acts here in question provide specifically for the costs of making and putting in force, and of obtaining and executing the warrant of distress.

D. N. Pritt in support of the rule nisi. The justices had jurisdiction to hear and determine the complaint but declined to do so, and they ought therefore to be ordered to do so. The charges claimed by the drainage board in respect of the distress are in excess of the amount allowed by law, and the excess should be disallowed and repaid to the applicant.

The Distress (Costs) Acts, 1817 and 1827, are not overruled as regards the costs of a distress for sewer rate and the limitations imposed by these Acts remain in force. The later legislation referred to does not overrule these Acts as being inconsistent with or repugnant to them. Sect. 55 of the Sewers Act, 1833, is not inconsistent with the older Acts. Assuming that that section provides for the costs of distress, it deals only with costs already incurred before the distress

(1) [1906] A. C. 286.

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is made. It relates to the costs of making and putting in force the distress warrant but not with the costs of making the distress. The section contains no provision as to the costs of the actual distress, not even a direction that they shall be reasonable. That section, however, does not provide for the costs of distress. It relates only to the making and putting in force of an order or decree of the court of sewers, and a distress warrant of that court is not an order or decree of that court. Neither is s. 7 of the Sewers Act, 1849, inconsistent with the older Acts. That section does, no doubt, provide for the costs incurred in obtaining and executing a distress warrant. It does not, however, expressly state what the amount of these costs is to be, and it must therefore be taken to mean that the amount shall be the amount permitted by the existing law, which in a case where the sum due does not exceed 20*l.* is the amount fixed by the two older Acts.

The decision in *Coster* v. *Headland* (1) covers the present case. The words of the section there in question—namely, s. 1 of the Distress for Rates Act, 1849, providing for the costs of distress are stronger than the words of s. 55 of the Act of 1833 or of s. 7 of the Sewers Act, 1849, yet it was held in that case that that later section did not repeal the older Acts as regards the costs of a distress for rates not exceeding 20*l.*

As regards the costs of a distress for sewer rate where the sum demanded and due does not exceed 20*l.* the provisions of the older Acts are not repealed by the later Acts but remain in force, and no costs of the distress can be recovered beyond those fixed in the Schedule to the Act of 1817.

LORD HEWART C.J. This is a rule nisi for an order in the nature of a mandamus to justices to hear and determine a complaint by Joseph Porter, the applicant, against one Thomas F. Harrington, a bailiff employed by the Ouse Drainage Board, charging that the said bailiff on March 23 last at Feltwell in the county of Norfolk, then being employed

(1) [1906] A. C. 286.

to make a distress upon the goods and chattels of the applicant for arrears of taxes alleged to be due from the applicant to the Board not exceeding in amount 20*l*., to wit 4*l*. 16*s*. 11*d*., did make such distress and afterwards between the said March 23 and April 22 last unlawfully did retain take and receive from the applicant out of the produce of the said goods and chattels so distrained upon certain charges other than and exceeding in amount the respective costs and charges allowed by the Distress (Costs) Act, 1817, and the Distress (Costs) Act, 1827, that is to say the sum of 6*l*. 16*s*. 8*d*. for alleged fees and expenses. The ground upon which the rule was obtained is that, as alleged on the part of the applicant, the justices have jurisdiction to hear that complaint and nevertheless declined jurisdiction.

The question raised, which is by no means without interest and importance, turns upon the true construction of certain comparatively old statutes in relation to statutes of more recent date, and it may be briefly stated. It appears from the somewhat meagre affidavits which are before the Court that as soon as the complaint was mentioned to the justices the point was taken that they had no jurisdiction to enter upon the merits of the complaint unless the complaint was manifestly founded upon the Distress (Costs) Acts, 1817 and 1827, and that the limitations imposed by these Acts no longer had any relation to a sewer rate. The justices, it would seem, forthwith accepted that submission and refrained from exploring the merits of the applicant's complaint, being satisfied that the limits imposed by that earlier legislation had for some time ceased to apply to the matter in question. It has been contended before us that the justices were right in taking that view for the reason that the combined effect of the Sewers Act, 1833, and the Sewers Act, 1849, is entirely to get rid of the rigorous limits imposed by the Acts of 1817 and 1827. It is true that when one looks at these Sewers Acts it may very easily appear at least upon a hasty view that they contain provisions which are inconsistent with the limitations prescribed by the earlier Acts of 1817 and 1827. Our attention has, however, been directed to the case of

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Coster v. *Headland* (1), where a similar argument was unsuccessfully adduced with reference to distress for poor rate, and it seems to me that the reasoning employed in that case, although it had specific reference to poor rate, has no less application to the present matter. In that case Lord Loreburn L.C. used these words: "We have under consideration 'charges' for 'taking, keeping and selling distress.' An Act of 1827, which says in terms that charges for distress shall, in cases not exceeding 20*l.*, be according to a particular Schedule, is still upon the statute book. Here is a charge for distress in a case under 20*l.*, and that charge is beyond the Schedule rate. That seems to me necessarily to conclude our decision, unless there is some special reason showing that the Act is inapplicable." (2) Lord Loreburn then proceeded to examine the question whether reason had been shown why the Act was inapplicable, as being inconsistent with a later Act, and he came to the conclusion that the Acts which were said to be incompatible could be and ought to be read together. He further said in reference to the later Act there in question, the Distress for Rates Act, 1849: "But even if a new standard is set up by the Act of 1849, is it incompatible with the special limitation being still preserved under the Act of 1827 as to distresses not exceeding the sum of 20*l.*? I think it is not incompatible, and that it makes no difference whether the one Act precedes or follows the other. I read them both together. One of them says that the charges are to be reasonable, the other says that the charges in cases not exceeding 20*l.* are to be according to the Schedule." (3) In like manner Lord Macnaghten said: "I think the statute of 1827 is a statute of universal application, and when the statute of 1849 was passed it applied to it, and would only not have applied if it had been specially excluded." (3) I cannot see any reason why that language is more applicable in the case of a statute relating to distress for poor rate than in the case of a statute relating to distress for sewer rate. Lord Robertson said of

(1) [1906] A. C. 286. (2) [1906] A. C. 288.
(3) [1906] A. C. 289.

the Act of 1827: "That is not merely a general statute, but it is a statute applicable to future rates, and lies in wait, as it were, for Acts which may be passed, and imprints upon them a certain limitation." (1) Lord Davey delivered a judgment of significant brevity. He said that the reasons stated by Stirling L.J. when the case was in the Court of Appeal seemed to him to be so clearly put that he was content to accept what Stirling L.J. had said as a judgment of his own. (1) On turning to the judgment of Stirling L.J. one finds passages which seem to be singularly applicable to the matter now before us. Referring to the Act of 1827, Stirling L.J. said: "But that Act was not repealed. It remained on the statute book ready to come into operation as soon as further provision was made with regard to the expenses of distresses for poor-rates, unless the Legislature thought fit to provide otherwise. The Act of 1849 in substance restored the provisions of the repealed Act of 1754 (27 Geo. 2, c. 20), and it did not repeal the Act of 1817, nor in my opinion the Act of 1827. The provisions of those two Acts must, I think, be taken to amount to a definition by the Legislature of what are to be deemed reasonable charges in respect of the expenses of the distresses contemplated by the Acts respectively in cases where the sum demanded and due does not exceed 20*l*." (2) A little later the learned Lord Justice added: "The Distress (Costs) Act, 1827, is, it may be observed, a general Act dealing not only with poor-rates, but with other rates as well, and the limitations which it imposes are still in force, as it appears to me, with regard to distresses for such other rates." (3) That is the judgment which Lord Davey, in the significant terms which I have mentioned, approved and adopted.

It is not suggested that these Sewers Acts have expressly repealed, so far as sewer rates are concerned, the provisions of the Distress (Costs) Acts. The argument is that a comparison and contrast of the provisions of the Sewers Acts on the one hand and those earlier statutes on the other

(1) [1906] A. C. 289. (2) [1905] 1 K. B. 219, 234.
(3) [1905] 1 K. B. 235.

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hand reveal such an incompatibility as to involve the conclusion that, so far at least as sewer rates are concerned, the limitations of the earlier Acts are by implication repealed. I do not think that that conclusion has been established. Indeed, I think it is apparent that in s. 55 of the Act of 1833 and s. 7 of the Act of 1849 a distinction is drawn between what may be called the costs, charges and expenses antecedent to the distress warrant, and the costs and charges of the distress. The charges of the first kind, if there be any and if they may be included, are to be specified in the warrant. The charges of the second kind—and it is with charges of that kind only that we are now dealing—are left vague in these enactments. Those, however, are the charges with which the Distress (Costs) Acts are particularly concerned. When the provisions of the Sewers Acts are placed side by side with those of the two earlier Acts, I do not think there is any real inconsistency between the two sets of provisions as regards cases in which the sum demanded and due does not exceed 20*l.* It seems to me that the provisions are all capable of being read together. If that is the true conclusion, it follows that, in the cases with which the Distress (Costs) Acts, 1817 and 1827, are concerned, the limitations imposed by these Acts still remain, and if in a particular case, although for the recovery of an unpaid sewer rate, the scale prescribed by these Acts in the class of case to which they refer is exceeded, I do not think there is anything to prevent the complainant from going to the justices and in reliance upon these Acts asking for the appropriate relief.

For these reasons, believing that the Acts of 1817 and 1827 are still of force and effect, and that the pecuniary limits imposed by those Acts are still to be observed, I think that this rule should be made absolute, and that the case should go back to the justices with a direction that they hear it.

AVORY J. I agree. The essential question in this case is whether a later statute which provides that a person shall be entitled to recover the costs incurred in certain proceedings, is inconsistent with an earlier statute which provides that

there shall be a maximum limit for the costs incurred in these proceedings in certain cases. In my view the judgment, which my Lord has just pronounced, has rightly followed the decision of the House of Lords in *Coster* v. *Headland* (1), and that conclusion is enforced when one recognizes that that case came after the decision of the Divisional Court in *Hill* v. *Pannifer*. (2) In that case before the Divisional Court I find that Channell J., who was one of the judges, when dealing in the course of his judgment with the Distress for Rates Act, 1849, which was the subject of consideration in the House of Lords, said: "It is inconsistent with there being a maximum limit of charges to say that a man is to have his reasonable costs. The present case shews it. There are costs which do exceed that maximum limit, and which are found to be in point of fact reasonable. It seems to me, therefore, that the later statute is necessarily inconsistent with the continued existence, not of the other statute as a whole, but of the other statute as applicable to distress for poor-rate, which is the subject of this case." (3) The reasoning there relied upon by the learned judge is really the argument which has been presented to us to-day by Mr. Montgomery. Now, the view there arrived at was expressly overruled by the Court of Appeal in *Coster* v. *Headland* (4), where Collins M.R. said in his judgment: "I feel bound to differ from the decision of that Court in *Hill* v. *Pannifer*." (2) Moreover, in his argument in the House of Lords in *Coster* v. *Headland* (1) Mr. Danckwerts for the appellant relied on that decision in *Hill* v. *Pannifer* (2), but did so without success. It must, therefore, be taken that the House of Lords in *Coster* v. *Headland* (1) adopted the view of the Court of Appeal in that case and expressly overruled the decision in *Hill* v. *Pannifer* (2), which, as I have said, appears to me to be a decision based upon reasoning in terms similar to the argument which has been addressed to us to-day on behalf of the justices.

(1) [1906] A. C. 286.
(2) [1904] 1 K. B. 811.
(3) [1904] 1 K. B. 811, 819.
(4) [1905] 1 K. B. 219, 231; affirmed [1906] A. C. 286.

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SALTER J. I am of the same opinion. I think that Mr. Montgomery's strongest argument is that which relates to the distinction between the costs incurred in the task of obtaining the warrant to distrain and the costs incurred in the task of executing it. He pointed out that the Sewers Acts, on which he relies, give to the court of sewers a power to order that the costs of obtaining the warrant shall be levied on the goods of the ratepayer, whereas under the Distress (Costs) Acts, 1817 and 1827, there can be no costs of obtaining the warrant to distrain. Therefore, he says, the earlier Acts are inconsistent with and are impliedly repealed by the later. I observe, however, that the same point arose in the case of *Coster* v. *Headland* (1) without availing the applicant. There the Distress for Rates Act, 1849, authorized the justices to order that a sum such as they might deem reasonable for the costs and expenses incurred in obtaining the warrant should be levied on the goods of the ratepayer, but notwithstanding that the House of Lords held that there was no implied repeal by that Act of the earlier Acts, and I think that this case is included in that decision.

Order absolute.

LORD HEWART C.J. It ought, I think, to be added that the order now made does not deal one way or the other with the question whether the applicant is entitled to recover the expense incurred in feeding the horse, as that question has not been argued before this Court.

Solicitors: *Simmons & Simmons, for R. A. Hodges, Cambridge; McBride & Co., for Wm. R. Greenland, Thetford.*

(1) [1906] A. C. 286.

J. R.

[IN THE COURT OF APPEAL.]

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THE KING *v.* NORTH.

Ex parte OAKEY.

Ecclesiastical Law—Injury to Ornament in Church for which Vicar alleged to be responsible—Faculty to Person interested to restore—General Citation—Non-appearance of Vicar—Order against him for Costs of Restoration and Petition—Jurisdiction—Prohibition—Delay in Application for—Whether barred by Right of Appeal.

A faculty was granted to a vicar and churchwardens to restore a screen in a church. In the course of the work of restoration damage not authorized by the faculty was done to a fresco. A parishioner interested in the fresco petitioned the Consistory Court for a faculty to repair the damage. The petition alleged that the damage was done by the vicar's order, but did not ask that he should pay the cost of reparation. A general citation was issued citing all the parishioners and inhabitants to show cause why a faculty should not be granted to allow of the repair, but no special citation was issued to the vicar. The vicar knew of the petition, but did not appear. In his absence the judge of the Consistory Court on July 24, 1925, granted the faculty asked, and ordered him to pay the expense of reparation and the costs of the petition. On February 11, 1926, a monition was issued ordering him to pay the said sums under threat of sequestration. On March 9 the vicar applied for prohibition:—

Held (1.), that as the order of July 24 and the monition were made without giving the vicar an opportunity of being heard in his defence they were made without jurisdiction and prohibition ought to issue.

(2.) That there was no such delay in applying for prohibition as would justify a refusal of the writ.

(3.) That even if the order and the monition might have been the subject of an appeal to the Court of Arches, which was very doubtful, as the vicar was not a party to the proceedings, that fact was no ground for refusing prohibition.

Judgment of Divisional Court reversed.

APPEAL from the judgment of a Divisional Court.

In the year 1869, in the course of the general restoration of the parish church of Eye, in the county of Suffolk, a fresco was painted above the altar by a Mr. William Short. In the year 1923 a faculty was obtained by the vicar and churchwardens for the restoration of the chancel screen, the expense being borne by the trustees of the will of Sir Thomas Tacon,

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and Mr. J. N. Comper was employed as architect to carry out the work.

Early in the year 1925, during the progress of that restoration, Mr. Comper, with the knowledge of, and without any expressed disapproval on the part of, the Rev. J. P. Oakey, the vicar of the parish, caused Mr. Short's fresco to be distempered over. It was not disputed that its obliteration was unauthorized by the faculty. On discovering what had been done Miss Mary E. Short, the daughter of the painter, wrote a letter of complaint to the vicar resenting it as an insult to the memory of her father. Mr. Oakey replied that the distempering of the fresco was done by the architect's directions and not by his. Mr. Comper, who was not aware that the fresco was the work of Miss Short's father, expressed to her his regret at the occurrence, and at the same time said that he desired to take the entire responsibility for having obliterated it as not being in harmony with his design. But Miss Short refused to allow Mr. Comper to take the blame, and on May 16, 1925, presented a petition in the Consistory Court of the diocese, which after alleging that the fresco had "been distempered over by the order of the Rev. J. P. Oakey," that "it is desired that the fresco . . . . should be restored," and that at a meeting of the Parochial Church Council a resolution was carried "that Miss Short apply for a faculty to restore the fresco," prayed the Court to "decree a faculty for the purposes aforesaid."

On June 25 a citation, which recited that the fresco had been distempered over by the order of Mr. Oakey, was issued citing "the parishioners and inhabitants of the said parish of Eye in special and all others in general having or pretending to have any right title or interest in this behalf to appear" on the date therein specified at the Consistory Court at Bury St. Edmunds to show cause why a faculty should not be granted to the petitioner in the terms of the petition. That citation was duly posted on the church door in the ordinary way, and on the following day, June 26, a letter was sent to Mr. Oakey by Mr. Brundell, the solicitor

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of the petitioner, giving him notice of the issue of the citation. On July 24 the petition was heard before the Chancellor, and at that hearing Mr. Oakey did not appear. The Chancellor made an order directing that a faculty should issue empowering the petitioner to do all the necessary work to effect a restoration of the painting, repeating the averment that it had been distempered over by the order of Mr. Oakey, and ordering that he should pay to the petitioner all expenses incurred in connection with the work, and further should pay her all the legal costs occasioned by the petition. On September 21 the formal faculty was issued embodying the said order. On September 22 the petitioner's solicitor sent to Mr. Oakey his bill of costs of the petition with notice of the date of intended taxation. Mr. Oakey did not attend the taxation. On February 11, 1926, a monition was issued from the Consistory Court, which, after reciting the petition, the citation, the hearing before the Court and the order made by it, and further stating that the petitioner's costs had been taxed and allowed at 42*l.* 13*s.* 6*d.* and that the expenses of the work of restoration authorized by the faculty amounted to 74*l.* 14*s.* 6*d.*, ordered the Rev. J. P. Oakey to pay the said two sums within fourteen days, or in default to show cause why the profits of his benefice should not be sequestrated. On March 9, 1926, Mr. Oakey obtained from the King's Bench Division a rule nisi for a writ of prohibition directed to the Chancellor to prohibit him from further proceeding in the matter of the order of July 24 and of the monition, on the ground that as Mr. Oakey was not a party to the proceedings for the faculty, the Court had no jurisdiction to order him to pay either of the two sums in question. On the argument of the rule the Divisional Court (Lord Hewart C.J. and Avory J.; Shearman J. dissenting) discharged it. The majority of the Court were of opinion that the Chancellor had not exceeded his jurisdiction, for even if Mr. Oakey was not technically a party, not having been specially cited, he had abundant notice of the proceedings and of the complaint that was being made against him. They were also of opinion that if there had been an excess

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of jurisdiction Mr. Oakey had been guilty of such delay in coming to the superior Court as deprived him of the right to ask for the particular remedy of prohibition; and further held that the remedy in any case was appeal and not prohibition.

Mr. Oakey appealed.

Ernest Charles K.C. and *H. Hardy* for the appellant. There was no jurisdiction to order the appellant to pay the costs of the restoration and of the petition, for he was not a party. He was not specially cited and he did not appear to the general citation. Moreover there was no suggestion in either the petition or the citation that he was going to be called upon to pay these costs. The petition only asked for a faculty authorizing the petitioner to do the work of restoration, and it was quite consistent with an intention on her part to do it at her own expense. The statement that the fresco was distempered over by the appellant's order is only part of the history of the case. The appellant knew that the persons really responsible for the damage were the Tacon trustees, who intended to take the responsibility, and there was consequently no reason why he should appear. It is contrary to natural justice that a person who is not a party to a suit and is under no obligation to appear should be ordered by a judgment to pay the damages and the costs of the suit. If the appellant had been specially cited by name and had not appeared the Consistory Court would have been perfectly justified in making these orders, but he was not, and there was no more reason why he should appear than any other of the parishioners. The decision of the Divisional Court is based on a misconception of what a general citation is. It is a mere statement that something will be done if no one intervenes. Then, if the orders of the Consistory Court were made without jurisdiction, prohibition ought to issue. The objection that the remedy is appeal and not prohibition is ill founded. In the first place Mr. Oakey could not have appealed, for only parties can appeal, and he was not a party. But even if he could have appealed that is no ground for

refusing prohibition in the present case. To the general rule that where there is a right of appeal prohibition will not lie there is an exception—namely, in cases in which the judgment objected to violates some fundamental principle of justice, which is the very ground of the objection to the Chancellor's orders. Nor is there any substance in the other objection to prohibition on which the Divisional Court relied. There was here no undue delay on the part of the appellant in applying for the writ. The obligation of the appellant to pay the two sums was not complete until the issue of the monition on February 11. For the purpose of considering whether there had been delay time must be treated as running not from the notice of the order of July 24, as held by the Divisional Court, but from the issue of the monition. In *In re London and Scottish Permanent Building Society* (1) Wright J. said: "An application for prohibition is never too late so long as there is something left for it to operate upon." The application for the rule nisi was on March 9, and to allow a period of twenty-six days to elapse before application cannot be regarded as improper delay.

E. W. Hansell for the respondent. The whole of the trouble in this case was caused by the action of the vicar. In 1923 the faculty for the restoration of the screen was granted to him and the churchwardens. That faculty did not authorize him to distemper over the fresco, consequently to do so was an illegal act. For that act the vicar, as grantee of the faculty, was responsible. The subject-matter of the petition was one with which the Consistory Court alone could deal, and the vicar as a parishioner was subject to its jurisdiction. Therefore there was no defect of jurisdiction, and this Court is not entitled to interfere by prohibition. The fact that the vicar was not specially cited, and did not appear to the general citation, is immaterial. He had notice of the terms of the petition, in which it was alleged that the fresco had been distempered over by his order, a statement which was wholly irrelevant, except upon the assumption that he was going to be required to pay for the damage. It has never

(1) (1893) 63 L. J. (Q.B.) 112, 113.

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been the practice that a petition for a faculty to repair damage done in a church should ask for either the expenses of the repair or the cost of the petition. Even if he ought technically to have been specially cited, and the petition ought to have asked that he should pay the damages and costs, the absence of such a citation and demand was a defect only of form, and was the proper subject of an appeal. But if there was a right of appeal that fact, according to the general rule, excludes prohibition. In *Ex parte Smyth* (1), a wife's suit for restitution of conjugal rights, the husband appeared under protest, and, being ordered by the Ecclesiastical Court to appear absolutely, applied for a prohibition. The King's Bench refused the writ. Littledale J., delivering the judgment of the Court, said: "Whether they are right in so decreeing or not is a question of practice, not of jurisdiction. The temporal Courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognisance, the practice has been regular. The only instances in which the temporal Courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court. The proceeding here complained of comes within neither of these heads." In *Ex parte Story* (2), which also was a wife's suit for restitution of conjugal rights, the husband appeared and received notice of an intended application to the Court for an order on him to take his wife home, and also that he should be pronounced in contempt for having disobeyed an order to pay alimony. At the hearing the application related only to alimony. But subsequently two decrees were made in his absence, one ordering him to receive his wife, and the other to pay alimony. A writ of prohibition was refused. Parke B. said: "In this case the Ecclesiastical Court had jurisdiction; and if any irregularity has been committed that does not take away jurisdiction, but merely forms the ground of an appeal."

(1) (1835) 3 Ad. & E. 719, 724. (2) (1852) 22 L. J. (Ex.) 33, 35.

In *Martin* v. *Mackonochie* (1), where the Court of Arches had jurisdiction over a suit for ecclesiastical offences, on the question whether prohibition would lie to that Court, Thesiger L.J. said: "The mode in which that suit is to be conducted, the sentence which it is open to the judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision relating to these matters, to be regulated by the practice of the Court itself, and in respect of which, if the judge errs, appeal and not prohibition, would be the proper remedy, unless his error involves the doing of something which, in the words of Littledale J. in *Ex parte Smyth* (2), is 'contrary to the general laws of the land,' or, to use the language of Lush J. in the Court below, is 'so vicious as to violate some fundamental principle of justice.'" Here the orders of the Consistory Court cannot fairly be said to come within that exception; for the vicar all along knew perfectly well what was the complaint against him, and under those circumstances to order him to pay this money was not contrary to natural justice. But in any case the vicar was guilty of unreasonable delay in applying for the writ. On September 21 the formal grant of the faculty was issued to Miss Short, and that document contained the formal order that the vicar should pay the expense of repair and the costs of the petition. It is true that neither of those two sums had been ascertained at that date, but he knew that he would have to pay them as soon as the amounts were ascertained. That therefore was the time at which he ought to have intervened and objected to the jurisdiction. But he took no step till March 9, nearly six months after he had notice that the claim would be made against him.

BANKES L.J. The question which we have to consider in this case is, what is the legal position of a person against whom an order for the payment of money has been made in a judicial proceeding where the person had no opportunity of being heard before the order was made? The rule of law

(1) (1879) 4 Q. B. D. 697, 732. (2) 3 Ad. & E. 719.

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applicable to such a case is thus stated in Broom's Legal Maxims, 9th ed., p.78: "It has long been a received rule that no one is to be condemned, punished, or deprived of his property in any judicial proceeding unless he has had an opportunity of being heard." That is the general rule which we have to apply, and I should like to refer to two cases as illustrating it, as they, like the present, were cases which arose in the Ecclesiastical Court. The first is *Capel* v. *Child*. (1) There a complaint having been made to the Bishop of London that the incumbent of a parish in his diocese had neglected his duties, the bishop, without calling upon him to show cause, issued a requisition ordering him to nominate a curate at a stipend of 75*l*. a year to assist in the duties of the parish. The incumbent ignored the order, whereupon the bishop appointed a curate, and upon the incumbent neglecting to pay the stipend directed sequestration. The incumbent brought an action against the sequestrators for fees detained, and on a special case stated for the opinion of the Court of Exchequer it was held that the requisition and the proceedings founded on it were void. Bayley B. said: "It would be quite sufficient if the bishop were to call the party before him, and to state to him the grounds on which he thought the duties were inadequately performed, by reason of his negligence; and he should have asked whether he had or had not any grounds on which he could answer that charge; but, is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard? . . . . I know of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard. . . . . Now, in this case, it is impossible, as it seems to me, to say, that the requisition is not in the nature of a judicial proceeding. It does not call upon the party to show cause, but, transit in rem judicatam, it requires him to do the act. . . . . The effect of a curate being appointed by himself, or of an appointment of a curate by

(1) (1832) 2 Cr. & J. 558, 579, 580.

the bishop, is, for so long a time as the curate shall continue, to deprive him of a portion of the profits of his benefice." In the other case, *Bonaker* v. *Evans* (1), the Bishop of Worcester had ordered the plaintiff, the vicar of a parish, to reside on his benefice. The plaintiff refused to do so on the ground that the vicarage was damp and uncomfortable, whereupon the bishop sequestrated the profits of the benefice without first giving the plaintiff notice to show cause. In an action of debt against the sequestrator it was held that the action was well brought. Parke B. said (2): "The bishop, then, acting judicially in this respect, the main question for our consideration is, whether the sequestration ordered by him is a proceeding simply in the nature of a distress to compel residence, or altogether, or even in part, in pœnam for previous non-residence or absence. If it be the latter, then the bishop ought to have given the incumbent an opportunity of being heard before it was issued; for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary." That then being the rule it is our duty to consider whether, on the facts of this particular case, the Chancellor has offended against it, and whether a writ of prohibition should be granted. With the merits of the case we have no concern; all we have to decide is whether Mr. Oakey was given an opportunity of answering the case made against him before the order for payment was made. In my opinion he was not. The first step in the proceedings was the petition for the faculty. The form of that petition negatives any idea that an order for payment was going to be asked for against the vicar personally. It may be that in order to obtain the faculty it was necessary to suggest to the Court in the petition that the damage which it was sought to repair had been done without authority, but the petition does not go on to ask

(1) (1850) 16 Q. B. 162. (2) 16 Q. B. 171.

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that the wrongdoer should pay, it merely asks for authority to the applicant to restore what had been obliterated, and any ordinary person reading that would understand it to mean that the applicant proposed to bear the cost of the restoration herself. Then the petition is followed by a citation. That citation is in the widest possible terms, being addressed to all the parishioners and inhabitants of the parish and other persons interested in the subject-matter, giving them all an opportunity to appear if they chose. But it did not require them to appear, and if they declined to appear they had no connection with the procedings; all the persons so declining to appear stood on the same footing, and no distinction was capable of being drawn between the vicar and any of the others. They were none of them parties to the proceedings which followed, and in my opinion the Chancellor had no jurisdiction to make an order for payment against any of them without a special citation informing them that damages and costs were being asked against them.

But it was contended that even so the writ of prohibition, which is discretionary, ought to be refused in the present case and for two reasons. In the first place it is said that the vicar had not acted with the necessary promptness in making the application, having allowed nearly six months to elapse since he was first informed by the order of July 24, 1925, that an order for payment of damages and costs was going to be made against him. But that is not the proper date from which time should be computed for the purpose of determining whether there has been delay. The monition which is a very effective part of the order complained of was not issued till February 11, 1926, which was less than a month before the application for the writ. That is not such a delay as would justify the Court in exercising its discretion against the applicant. The objection on the ground of delay therefore fails.

Then it was said that the vicar had a right of appeal, and that under those circumstances appeal was his only remedy, and that he could not ask for a prohibition. I am not going to decide here whether he had a right of appeal or not, though

there is strong reason for saying that, as he was not a party to a suit, he had not. But even if he had a right of appeal, in the case to which Atkin L.J. has referred me, *White* v. *Steele* (1), where the case was very similar to the present, the Court definitely stated that in their opinion the fact that there was an appeal to the Court of Arches was no ground for refusing a writ of prohibition. That objection therefore also fails, and the appeal from the Divisional Court must be allowed.

SCRUTTON L.J. A faculty having been granted to the vicar and churchwardens of the parish of Eye to do certain work in the church in connection with a war memorial, an existing fresco was distempered over, the obliteration not being provided for by the faculty. The daughter of the gentleman who had painted the fresco, not unnaturally, felt aggrieved. Whether the vicar was responsible for that improper proceeding is not a matter which we have here to decide. This is not an appeal from the Chancellor's decision. It is an application to the secular Court to prohibit further proceedings on an order of the Consistory Court on the ground that that order was made without jurisdiction, and that application has nothing to do with the merits of the case.

There seems to be no doubt that if a special citation had been issued to the vicar by name reciting a petition that a faculty should issue ordering him to restore at his own expense the fresco which had been obliterated, the matter would have been entirely within the jurisdiction of the Ecclesiastical Court, and, if the evidence justified it, the order asked for might properly have been made whether he appeared or not. There seem to be ample precedents for such a proceeding. I find one in *Sieveking and Evans* v. *Kingsford* (2), and another in *Hopper* v. *Davis* (3), in both of which cases a person who had removed from a church a particular ornament without lawful authority was dealt with by the Ecclesiastical Courts after notice to him in which he was specially cited.

(1) (1862) 12 C. B. (N. S.) 383. (2) (1866) 36 L. J. (Eccl.) 1.
(3) (1754) 1 Lee, Eccl. 640.

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Unfortunately that form of procedure was not followed here. The lady presented a petition stating that it was desired that the fresco should be restored and requesting the Court "to decree a faculty for the purpose aforesaid." It appears that the practice of the Ecclesiastical Court is to grant the faculty to the person who applies for it, that is to say the lady here would be the person authorized to do the work, but nothing whatever is said in the petition to the effect that a further order would be asked for ordering the vicar to pay the expense of doing it. Then the petition is followed by a citation addressed to all the clerks and literate persons in the diocese requiring them, by affixing a copy of the citation on the door of the parish church, "to cite the parishioners and inhabitants of the said parish of Eye and all others in general having or pretending to have any right title or interest in this behalf to appear" in the Consistory Court of the diocese and show cause why a faculty should not be granted to the petitioner in the terms of the petition. That also fails to give any intimation that what is really going to be asked is that though the lady does the work the vicar shall pay the expense of her doing it. In my view an order that any one shall pay the cost of restoring work which has been obliterated without a faculty is in the nature of a penalty for an ecclesiastical offence, and one of the most fundamental principles of English law is that if you are going to impose on a person a penalty for an offence, you must first clearly inform him that an application to that effect is going to be made against him, so that he may know what he is charged with and have an opportunity of attending to meet it. There are numerous cases in which that principle has been laid down; my Lord has referred to two of them. To issue a general citation to the parishioners and inhabitants of the parish, without including in it a statement that what is going to be asked for is an order that one of those parishioners shall pay a sum which is in the nature of a penalty for an ecclesiastical offence, is not giving that parishioner a fair opportunity of learning the charge made against him and of being heard in answer to it. In my opinion, therefore, the

original proceedings in the Consistory Court were without jurisdiction, and prohibition consequently would lie. But further it appears to me that the issue of the monition was equally without jurisdiction, for though the vicar had notice of the order of July 24 and of the intended taxation of costs, he had no notice that the monition was going to be issued peremptorily ordering him to pay a named sum, and according to the ordinary principles of the administration of justice he ought to have had notice of that.

Apart from the question of jurisdiction the Divisional Court gave two additional reasons why in their opinion the prohibition ought to be refused. In the first place they said that the vicar was guilty of undue delay in applying for the writ. But, in my view, so long as a sentence for the payment of a penalty is unexecuted, prohibition may lie if there is a threat to execute it. In such case delay is immaterial. I agree with the dictum of R. S. Wright J., a judge who had great familiarity with this subject, in *In re London and Scottish Permanent Building Society* (1), that "an application for prohibition is never too late so long as there is something left for it to operate upon." When the sentence is unexecuted a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced. That disposes of the objection on the ground of delay. The other objection raised by the Divisional Court was that there was a right of appeal, and that where an appeal lay there could be no prohibition. But the case to which Atkin L.J. has referred us, *White* v. *Steele* (2), appears to be a distinct answer to that. The judgment of Willes J. showed that in the opinion of a very strong Court the fact of there being a right of appeal was not necessarily fatal to the claim for prohibition. In *Martin* v. *Mackonochie* (3) Thesiger L.J., dealing with this question, said that error of the judge in the conduct of the suit, in the pronouncement of the sentence,

(1) 63 L. J. (Q. B.) 112, 113. (2) 12 C. B. (N. S.) 383.
(3) 4 Q. B. D. 697, 732.

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or in the means of its enforcement is matter in respect of which appeal and not prohibition would be the proper remedy, "unless his error involves the doing of something which, in the words of Littledale J. in *Ex parte Smyth* (1), is 'contrary to the general laws of the land,' or, to use the language of Lush J. in the Court below, is 'so vicious as to violate some fundamental principle of justice.'" And as I have already said, to order a man to pay what is in the nature of a penalty for an offence without first giving him notice that an application for such an order is going to be made, is both contrary to the general law of the land, and is so vicious as to violate a fundamental principle of justice. The case therefore falls within the exceptions to the general rule. For these reasons I agree that the appeal must succeed.

ATKIN L.J. This is a case which originated in the Consistory Court of the diocese of St. Edmundsbury at the instance of an applicant, Miss Short, who made quite a usual application for a faculty for the restoration of a fresco in the church which had been obliterated without lawful authority. She was especially interested in the matter, because the fresco in question had been painted some fifty years before by her father. There is no doubt that it had been obliterated without authority, and that she was clearly entitled to the faculty for which she asked. She stated in her petition that the fresco had been obliterated by the order of the vicar, but she asked for no relief against him, she only asked for permission to restore the fresco. The ordinary procedure was followed, a general citation being issued and published in the ordinary way by notice on the church door. It was a citation of all parishioners and inhabitants of the parish and all other persons interested in the subject-matter, and gave notice that if any persons desired to object to the granting of the faculty they must appear before the Chancellor on a named date. Nobody appeared. On July 24, the date fixed for the hearing, the Chancellor, in the absence of

(1) 3 Ad. & E. 719.

the vicar, made the order complained of. He decreed the faculty and at the same time made an order that the fresco should be restored at the vicar's expense, and further that the vicar should pay the costs of the petition. The costs having been taxed at 42*l.* 13*s.* 6*d.*, and the expense of the restoration being stated to be 74*l.* 14*s.* 6*d.*, a monition was issued ordering the vicar to pay those two sums within fourteen days. The vicar now applies for a rule for a prohibition to prohibit the Chancellor from proceeding upon the order of July 24 and upon the monition.

The question which we have to decide is whether or not the Chancellor had jurisdiction to make the original order upon the vicar. In my opinion he had not. The citation is a general citation addressed, not to the vicar in particular, but to the parishioners and inhabitants of the parish generally. There was no special citation, and no kind of notice given to him that he would be required to pay any costs, either of the restoration or of the petition. To my mind if a Chancellor seeks to exercise any coercive power over a parishioner, or anybody else who comes within the scope of a general citation, he must see that the person against whom the coercive jurisdiction is sought to be exercised has in fact received special notice that proceedings are being taken upon which an order may be made against him; and in the absence of a special citation of that kind it seems to me that there can be no power in the Chancellor to exercise any such coercive jurisdiction. I think, therefore, that the Chancellor in this case had no jurisdiction to order the vicar to pay the expense of the restoration or the costs of the proceedings. Under these circumstances it appears to me that the vicar is entitled to a prohibition, the order being a breach of the fundamental principle of law, that a person is entitled to have notice of a claim against him and to be heard before he can be deprived of his property. The order, being made without jurisdiction, was wholly without effect, and nothing could validly be done under it. The petitioner proceeded to tax her costs, but that taxation being without jurisdiction could have no effect upon the vicar's liability. She then

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obtained a monition requiring him to pay the costs so taxed, and also the sum which was stated to be the cost of restoration of the fresco, a sum the correctness of which the vicar had never had any opportunity of questioning at all.

Only two grounds were suggested why the writ of prohibition should not go. One was that the vicar ought to have appealed from the order to the Court of Arches. In the first place I am personally far from satisfied that he had any right of appeal at all, for I think it is very doubtful whether a person who is not a party to a suit, by reason of his neither having been specially cited nor having appeared to a general citation, can have any right of appeal. But whether that is so or not I think it is quite plain that the fact of there being a remedy by way of appeal is no answer to a writ of prohibition, where the want of jurisdiction complained of is based upon the breach of a fundamental principle of justice, such as I conceive to have been the case here. There is plenty of authority for the proposition that in such cases prohibition will lie notwithstanding that there is a right of appeal. The other ground was that the vicar was out of time, and upon that ground I can see no reason for withholding the writ. The Consistory Court made an order against the vicar for the payment of money. That order being without jurisdiction he is entitled to treat it as a mere brutum fulmen so long as no attempt is made to enforce it by execution upon his property, and when that is done by sequestration he is at liberty to apply for a prohibition to prohibit further proceeding on the order, even though there may have been a considerable interval of time since the order for payment was made, that is to say since the date of the monition. But even if the monition which threatened sequestration in default of payment is to be regarded as the date from which the time is to run within which the application for prohibition ought to have been made, here the application was made within a month from its issue. And that seems to me a very reasonable time in view of the complicated questions of law that have arisen. I do not think that there has been any delay

which the Court ought to take into account. I agree that the appeal should be allowed.

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REX v. NORTH. OAKEY, *Ex parte*.

Appeal allowed.

Solicitors for the appellant: *Brooks, Jenkins & Co.*

Solicitors for the respondent: *Morris & Bristow, for Brundell & Russell, Eye.*

J. F. C.

BOWEN *v.* WILSON.

1926 *Oct.* 28, 29; *Nov.* 11.

Motor Car—Use and Construction—Motor Cycle—Brakes operating on same Brake Drum—"Two independent brakes"—Motor Cars (Use and Construction) Order, 1904 (*St. R. & O.*, 1904, *No.* 315), *art. II.* (4.).

A motor cycle had two brakes, a hand brake and a foot brake, operating on the same brake drum on the rear wheel:—

Held, that it had "two independent brakes" within the meaning of art. II. (4.) of the Motor Cars (Use and Construction) Order, 1904, in that the brake drum was part of the wheel and not of the brake.

CASE stated by the stipendiary magistrate for Cardiff.

The appellant, James Rowland Bowen, was charged on an information preferred by the respondent, James Arthur Wilson, for that he did on June 26, 1926, unlawfully drive a motor cycle upon a certain highway without having two independent brakes in good working order and of such efficiency that the application of either to the motor cycle would cause one of the wheels to be so held as to be effectually prevented from revolving or to have the same effect in stopping the motor cycle as if such wheel were so held, against the form of the Motor Cars (Use and Construction) Order, 1904, dated March 9, 1904 (St. R. & O., 1904, No. 315), art. II. (4.).

It was proved or admitted that the motor cycle was fitted with one lever controlled by hand and another lever controlled by foot for the purpose of stopping it and controlling its speed. The hand lever communicated with a brake block, and the foot lever with another brake block. A brake drum

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was fixed to the spokes of the back wheel. The hand lever when used caused the hand brake block to press upon the brake drum, and the foot lever similarly caused the foot brake block to press upon the same drum. The hand lever and the foot lever could be used separately or together. Neither brake block could be used except by its pressure on the brake drum. Any flaw or accident to the brake drum which interfered with the efficient working of one brake block would also interfere in a similar manner with the efficient working of the other brake block, i.e., both brake blocks depended for their efficiency upon the good condition of the brake drum.

The magistrate was of opinion that the intention in framing the above Order was that if one of the brakes failed the other brake should be used in its stead, and that as the hand lever and brake block and the foot lever and brake block had, as he considered, a factor common to each, namely, the brake drum, the breakage of which would put both brakes out of action, the motor cycle had not two independent brakes within the meaning of the Order. He accordingly convicted the appellant, but stated this case.

Doughty K.C. and *Jenkin Jones* for the appellant. There was no evidence upon which the magistrate could come to the conclusion appealed against. It is admitted that the object of the Order was that if one brake failed the other could be applied. But in ordinary language the brake block is the brake, and it is intended to operate by pressure on the wheel or other part of the machine. Here it operated on the drum.

[LORD HEWART C.J. But is not the drum the medium through which the brake blocks operate on the wheel ?]

No, because the drum is itself part of the wheel. If the brake blocks operated on the rim of the wheel, as they did at one time, the case would be quite clear. The drum is only added in order (inter alia) to save friction on the rim.

[LORD HEWART C.J. If the drum came off, for example, through the too strong application of the hand brake, then

there would be nothing upon which the foot brake could operate.]

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That would be equally true in respect of any part of the machine upon which the brakes operated. The real question is, where does the brake end? It is submitted that it ends with the brake block.

[*Cannon* v. *Jefford* (1) was referred to.]

Wightman Powers for the respondent. The brake is the whole apparatus employed to retard or stop the cycle. The object of the Order was to have completely independent brakes, and the purpose of a brake is to retard or stop the wheel. The drum is not part of the wheel, for it is clear that the wheel is perfect without the drum, which is only added as part of the brake apparatus.

Doughty K.C. replied.

Cur. adv. vult.

Nov. 11. LORD HEWART C.J. This is a case stated by the learned stipendiary magistrate for the city of Cardiff. The matter arises in the following way. An information was preferred against the present appellant by the respondent for unlawfully driving a motor cycle upon a highway, "without having two independent brakes in good working order and of such efficiency that the application of either to the motor cycle would cause one of the wheels to be so held as to be effectually prevented from revolving or to have the same effect in stopping the motor cycle as if such wheel were so held." After hearing the evidence, the learned magistrate convicted the appellant for not having two independent brakes upon the motor cycle, as required by law.

The question for this Court is whether in coming to that determination the learned magistrate was right in law; in other words, whether there was evidence before him to justify the conclusion to which he came. The provisions of the Motor Cars (Use and Construction) Order, 1904, relevant to the matter are to be found in art. II., para. 4: "The motor car shall have two independent brakes in good

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working order, and of such efficiency that the application of either to the motor car shall cause two of its wheels on the same axle to be so held that the wheels shall be effectually prevented from revolving, or shall have the same effect in stopping the motor car as if such wheels were so held. Provided that in the case of a motor car having less than four wheels this condition shall apply as if, instead of two wheels on the same axle, one wheel was therein referred to." The interpretation of that Order was considered by this Court in the case of *Cannon* v. *Jefford* (1), where the question raised was to some extent similar to the question raised here—namely, whether in the actual mechanism employed there were common factors between the two brakes of such a kind as to deprive the brakes of the character of being independent of each other.

What is found in this case with reference to the brakes may be shortly stated. The motor cycle was fitted with two levers; one of the levers was controlled by hand and the other by the foot. The hand lever communicated with a brake block called the hand brake block; the foot lever communicated with another brake block called the foot brake block; and there was fixed to the spokes of the back wheel of the motor cycle a brake drum. The hand lever, when it was used, caused the hand brake block to press upon that brake drum; the foot lever, when it was used, caused the foot brake block to press upon the same drum; and the case finds that the hand lever and the foot lever could be used separately or together. Neither the hand brake block nor the foot brake block could work efficiently or at all except by pressure upon the brake drum. More than that, the case finds that any flaw or defect in or accident to the brake drum which interfered with the efficient working of one brake block would also interfere in a similar manner with the efficient working of the other brake block; that is to say, both brake blocks were dependent upon the efficient condition of one brake drum. In those circumstances the learned magistrate was of the opinion that the intention

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in framing the Order was that, if one of the brakes failed, the other independent brake could be used in its stead, and he was further of the opinion that the hand lever and brake block, and the foot lever and brake block, had a certain factor common to each, namely the brake drum, and that the breakage of the brake drum would put both brake blocks out of action. He therefore came to the conclusion that the motor cycle had not two independent brakes.

In the course of the argument I was much impressed by what was urged on the part of the respondent to the effect that the object of this provision was, so far as possible at any rate, to have two completely independent brakes; that the business of the brakes is to stop the revolution of the wheel; and that a brake is of little account if for any reason, when it is used or sought to be used, it fails, and the wheel continues to revolve. We were pressed by the argument that this brake drum is not really a part of the wheel but is a part of the brake; and that if anything went wrong with it—if for example it was severed from the wheel, or if it became partially severed so as to be loose—neither the one brake nor the other would produce any result upon the revolution of the wheel; and it was conceded that as there is one brake drum, so also there might mechanically be two, one being acted upon by the hand lever and the other being acted upon by the foot lever. These arguments undoubtedly seemed to me to be weighty and formidable.

Nevertheless, looking at the facts as a whole, I have, although with very great reluctance, come to the conclusion that the true view is that this brake drum is not a part of the brake; it is not a factor common to the two brakes; it is rather to be regarded, as Mr. Doughty, for the appellant, contended, as a part of the wheel; and if that view of the facts is correct, as upon consideration I have come to the conclusion it is, then there were no materials to justify this conviction, because the conviction is based upon the view that a part of the wheel itself is a factor common to the two brakes.

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For those reasons, and with much diffidence and reluctance, I have come to the conclusion that this appeal succeeds.

AVORY J. I have arrived at the same conclusion. The grounds of the learned magistrate's decision are stated as follows: "Any flaw or defect in or accident to the said brake drum which interfered with the efficient working of one brake block wou'd also interfere in a similar manner with the efficient working of the other brake block, i.e. both brake blocks depended upon the efficient condition of the said brake drum"; and he says: "I was of opinion that the intention in framing this Order was that if one of the brakes failed the other independent brake should be used in its stead. I was also of opinion that the hand lever and brake block and the foot lever and brake block had a certain factor common to each, namely the said brake drum, and that the breakage of the said brake drum would put both brake blocks out of action." I do not think it is correct to say that the brake drum in this case was a factor common to each of the brakes. In my view the brake drum was no part of the brake but was a part of the wheel upon which the brake acted when it came in contact with it. The brake ended at the brake block, and although it is true to say that the efficient working of each of the brakes depended upon the efficient condition of the brake drum, and that the breakage of the brake drum would put the brakes out of action, the same might be said of any part of the wheel or of the machine with which the brake blocks were intended to be brought into contact with a view to arresting the revolution of the wheel. I do not think that the brakes in this case can be said not to be independent or not to be efficient because a part of the machine upon which the brakes are intended to act may break or become damaged, whether it be part of the wheel itself or any other part of the machine.

In my opinion, therefore, the learned magistrate misdirected himself and there was no evidence upon which he could properly hold that there had been an infringement

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of the Order of 1904, and the appeal should therefore be allowed.

SALTER J. I agree. The question is whether this brake drum is part of the mechanism which applies the retarding force, or part of the vehicle to which the retarding force is applied. It is not possible to apply this form of brake in the old-fashioned way to the rim of the wheel, and therefore the wheel is fitted with what is in effect an alternative rim in order that the brake may be applied to it. I think the drum is part of the vehicle and not part of the brake.

Appeal allowed.

Solicitors for appellant: *Amery Parkes & Co., for Evan Rowlands, Swansea.*

Solicitors for respondent: *Smith, Rundell, Dods & Bockett, for Cecil G. Brown, Town Clerk, Cardiff.*

W. L. L. B.

ROBINSON, FISHER AND HARDING *v.* BEHAR.

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Nov. 17.

Sale of Goods—Auction Sale—Conditions of Sale—Condition that Goods no removed "shall" be resold—Refusal to resell—Action for Price.

The conditions of sale of a sale by auction provided that goods purchased and not paid for or removed within a specified time "shall" be resold, and the deficiency (if any) made good by the defaulter. The defendant, by his own negligence, purchased a lot in mistake for another. The plaintiffs, the auctioneers, refused to resell it under the above rule:—

Held, that "shall" was permissive and not mandatory, and that the auctioneers were entitled to maintain an action for the price of the lot which the defendant had purchased at the auction but had refused to remove or pay for.

APPEAL from West London County Court.

The appellant, the defendant, Jack Behar, was present at an auction sale held by the respondents, the plaintiffs' who were auctioneers, on December 9, 1925. Among other lots put up for sale were lots 62 and 63, both being Persian

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carpets of somewhat similar character, but differing in size and value. The defendant intended to bid for lot 62, but by his own negligence was absent in another part of the building when it was put up for auction. Entering the auction room when the other carpet, lot 63, was put up, he bid for it in the belief that he was bidding for lot 62, and eventually it was knocked down to him for 56*l*. On discovering his mistake, he asked the plaintiffs to put up the carpet he had purchased for sale again, relying on condition 7 of the conditions of sale, which provided: "Upon failure of complying with the above conditions, the money deposited in part of payment shall be forfeited; all lots uncleared within the time aforesaid shall be resold by public or private sale, and the deficiency (if any) attending such resale shall be made good by the defaulter at this sale." Among the "above conditions" were condition 4, which provided that purchasers were to pay down 5*s*. in the pound on the whole of the purchase money, if required, but which the defendant was never required to do; and condition 5, which provided that lots purchased were to be taken away and paid for the day after sale, neither of which stipulations were complied with by the defendant. The plaintiffs refused to put the carpet up for resale, either public or private, brought an action against the defendant for 56*l*., the price of the carpet, and recovered judgment.

The defendant appealed.

Casswell for the defendant. The judgment of the court below was wrong. The action was misconceived, and, assuming any cause of action to have arisen, should have been one for damages. Condition 7 applied in terms, for the defendant had not complied with condition 5 in that he had not removed the carpet and had refused to pay for it. The condition provided that in such a case a lot "shall," not "may" be resold, and was mandatory.

Moresby for the plaintiffs. The conditions of sale were not intended to apply to the case of a disputed sale. The defendant cannot at once approbate and reprobate his

contract, by first repudiating it and then relying on the conditions thereof. But assuming that he can rely on the conditions, "shall" is permissive, not obligatory. It is used three times in condition 7, and in its first and third use it is clearly permissive. It is not to be interpreted as having an obligatory meaning when used the second time. The condition was intended to be for the benefit of the plaintiffs.

Casswell in reply.

AVORY J. This was a claim for 56*l.*, the price of goods bargained and sold on December 9, 1925, and the particulars of claim were for "the amount of the defendant's bid for a Persian carpet (being lot 63) at an auction sale by the plaintiffs. . . . . The bargain and sale relied on is the said sale at the said auction." It appears that the defendant intended to purchase another lot, lot 62. By his own neglect he purchased lot 63. Prima facie, therefore, there was no answer to this claim. The defendant did not dispute that he bid for this lot nor that it was knocked down to him. But it was contended on his behalf that he was not liable in this action by reason of the conditions of sale printed on the catalogue. The argument is a curious one. It is the contention that in a case like the present one, where a man has bought something and afterwards regrets it, instead of paying for it and taking it away, he may, under condition 7, insist on the lot being resold by private or public sale, the deficiency, if any, being made good by him. It might be that there was no deficiency or that it was resold at an enhanced price. We are not told what would happen then. The argument is that because this lot was not taken away and paid for under condition 5, it then became compulsory on the auctioneers under condition 7 to resell it and debit any deficiency, or, I might suggest, credit with any surplus the defendant. Mr. Casswell, for the defendant, contended that the word "shall" in condition 7 is mandatory and that it is impossible to give any other meaning to it. Looking at the conditions I have no hesitation in coming to the conclusion that the condition is not compulsory but permissive,

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and must be read in that sense. In other words, condition 7 confers upon the auctioneers the option of exercising the powers conferred thereby, but the defendant is not entitled to insist on their exercise. I am therefore of opinion that the county court judge rightly decided this case, and that the appeal be dismissed.

MACKINNON J. I agree. I think it clear that condition 7 gives an option and does not impose an obligation.

Appeal dismissed.

Solicitor for appellant: *Stanley O. Matthews.*
Solicitors for respondents: *Haslewood, Hare & Co.*

W. L. L. B.

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Dec. 2, 3.

[IN THE COURT OF APPEAL.]

THE PUBLIC TRUSTEE AND ANOTHER *v.* DUCHY OF LANCASTER.

Tithe—Tithe Rentcharge—Conveyance of the Land without mentioning Tithe Rentcharge—Whether it passes—"Interest . . . . in the property conveyed"—Tithe Commutation Act, 1836 (6 *&* 7 *Will.* 4, *c.* 71), *ss.* 67, 71; *Conveyancing Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 63, *sub-s.* 1.

The provisions of the Tithe Commutation Act, 1836, whereby a tithe rentcharge "issuing out of the land" charged with it was substituted for tithe in kind, did not have the effect of converting the tithe, which was theretofore treated as a separate hereditament independent of the land in respect of which it was payable, into an "interest in" the land itself; and consequently such a rentcharge will not, upon a conveyance of the land without more, pass to the purchaser by virtue of s. 63 of the Conveyancing Act, 1881, which provides that "Every conveyance shall, by virtue of this Act, be effectual to pass all the . . . . interest . . . . which the conveying parties have in . . . . the property conveyed." Tithe rentcharge is, like tithe, a hereditament separate from the land, and express words are necessary to pass it.

APPEAL from the judgment of a Divisional Court affirming a judgment of the county court of Staffordshire holden at Burton-on-Trent.

The action was brought in the county court to recover a sum of 72*l.* 12*s.* 7*d.*, being two years' arrears of tithe rentcharge.

In 1859 Sir Oswald Mosley, of Rolleston Hall, in the county of Stafford (the second baronet), being owner of the lands of the parish of Tutbury, the rectory of which was impropriate, bought the rentcharge representing the rectorial tithes of that parish. There was no evidence that he executed any declaration of merger of the tithe in the manner provided by s. 71 (1) of the Tithe Commutation Act, 1836, but from that time forward, the person liable to pay the tithe and the person entitled to receive it being the same, no payment of the rectorial tithe was ever in fact made. In 1895 Sir Oswald Mosley, the fourth baronet, being then tenant for life, and his son Oswald Mosley, now Sir Oswald Mosley, the fifth baronet, being tenant in tail, joined in resettling the property, conveying it to trustees, subject to the life interest of the father, to the use of the son for life with remainders over. The conveyance included "the impropriate rectory of Tutbury and all rentcharges now payable or which shall from time to time be payable in lieu of the rectorial tithes or tenths issuing growing or arising out of and from all the messuages lands and hereditaments in the parish of Tutbury." By a deed of April 4, 1900, the son, Oswald Mosley, assigned to trustees his life interest in the hereditaments comprised in the resettlement of 1895 upon trust as to part for himself

(1) Sect. 67 of the Tithe Commutation Act, 1836, having enacted that the land shall be discharged from the payment of tithe and that "instead thereof there shall be payable thenceforth . . . . a sum of money . . . . in the nature of a rentcharge issuing out of the lands charged therewith";

Sect. 71 provided (inter alia) as follows: "And no such rentcharge shall merge or be extinguished in any estate of which the person for the time being entitled to such rentcharge may be seised or possessed in the lands on which the same shall be charged: Provided always that it shall be lawful for any person seised in possession of an estate in fee simple, or fee tail, of any tithes or rentcharge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said Commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have been charged."

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and as to part for other persons. The plaintiffs were the successors of the trustees of that deed. On October 10, 1915, Sir Oswald Mosley, the father, died. In 1919 Sir Oswald Mosley, the present baronet, in the exercise of his powers as tenant for life under the Settled Land Acts, offered the Rolleston Estate, including the lands of Tutbury, for sale by auction. On the first page of the book containing the particulars and conditions of sale there were certain "General Remarks and Stipulations," including the following: "2. The properties are sold subject to all . . . . outgoings of every description that may be subsisting or chargeable thereon, and the purchasers are to be deemed to have notice thereof whether mentioned in these particulars or not." "3. All outgoings that are known to be paid by the vendor are stated at the end of the description of each respective lot affected thereby." Among the lots so offered for sale No. 39 was Chapel House Farm, in the parish of Tutbury. In the particulars of sale of lot 39 the only outgoings were stated to be tithe 3*l.* 16*s.* 8*d.*, and land tax 4*l.* 8*s.* 9*d.* And in answer to requisitions on title the vendor said: "The land tax and tithe are as stated in the sale particulars. No other outgoings known." 3*l.* 16*s.* 8*d.* was the correct amount of the vicarial tithe. The Chapel House Farm was purchased by the Duchy of Lancaster, and on September 2, 1920, the lands were conveyed to the purchaser. It was subsequently discovered in 1925 that, unless it had been extinguished, there was a rectorial tithe rentcharge of 36*l.*6*s.* 3*d.* payable in respect of the said farm. But it was admitted that the representation to the contrary in the particulars of sale and in the answers to requisitions on title was innocent, the vendor having long forgotten the existence of the tithe owing to the fact of its never having been paid. The plaintiffs claimed two years' arrears of the rentcharge. The county court judge held: First, that the rectorial tithe rentcharge was still in existence; that from the fact of its non-payment for many years no inference could be drawn that it had become merged in the freehold, in view of the provision of the Tithe Commutation Act, 1836, that such a merger could only be

effected by deed; and he declined to presume that such a deed had been made and since lost, for if it had been made there would be some record of it at the office of the Board of Agriculture, the successors of the Tithe Commissioners, which there was not. Secondly, he held that the plaintiffs were not estopped from alleging the continued existence of the rentcharge by the misrepresentation in the particulars of sale, for the vendor who made the representation was not the agent of the plaintiffs to make it, and the plaintiffs were trustees of a settlement for the benefit of other persons besides the vendor. Thirdly, that the tithe rentcharge did not pass to the Duchy by the mere conveyance of the land out of which the rentcharge issued without express words. He accordingly gave judgment for the plaintiffs, and on appeal his decision was affirmed by the Divisional Court (Shearman and Roche JJ.).

The purchaser appealed.

Sir Herbert Cunliffe K.C. and *E. J. L. Whitaker* for the appellant. The plaintiffs have no title to sue, for the tithe rentcharge in question is not now in existence. From the time when it was bought in 1859 onwards it has never been paid. That fact, coupled with the fact that the person who bought it was the owner of the land, leads to the inference that it was merged in the freehold. No doubt to effect such a merger there must have been a deed declaring the rentcharge to be merged, in compliance with the provisions of s. 71 of the Tithe Commutation Act, 1836. But after this lapse of time it ought to be presumed that such a deed was executed and has since been lost. In *Norbury* v. *Meade* (1) Lord Redesdale said: "It is now held that it is not necessary for an impropriate rector to deduce his title from one person to another after a grant from the Crown has been shown. Why? Because the Courts are aware that deeds of that description may be lost." If that contention is wrong, still the plaintiffs, who are the assignees of the vendor's life interest under the deed of 1900, ought not to be allowed to

(1) (1821) 3 Bli. 211, 240.

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allege the continued existence of the rentcharge, for they, being privies, are estopped by their assignor's representation that there was no rectorial tithe charged upon the land sold to the Duchy. In *Mansel-Lewis* v. *Lees* (1), where the facts were very similar to those of the present case, the plaintiff on the sale of a farm innocently represented to the defendant, the purchaser, that the farm was subject to vicarial tithe only, and the price was arranged on that basis. The conveyance was silent on the subject of tithe. Subsequently the plaintiff discovered that the farm was subject to rectorial tithe, and that he, the plaintiff, was the lay impropriator. He accordingly sued the defendant for the recovery of the tithe. Phillimore and Bucknill JJ. held that the plaintiff was estopped by the misrepresentation which he had made from alleging the existence of the tithe. The only distinction between that case and this is that there the plaintiff was the person who himself made the misrepresentation, whereas here the plaintiffs were not. But that ought to make no difference, for the deed of 1900 was only a family arrangement, and in any case, as the plaintiffs held partly in trust for the vendor himself, they ought at least to be estopped to the extent of his interest.

If the defendant is wrong in that and the plaintiffs are entitled to insist that the tithe rentcharge still exists, it passed to the Duchy of Lancaster by virtue of s. 50 of the Settled Land Act, 1882, notwithstanding the previous assignment to the plaintiffs in 1900 (*In re Dickin and Kelsall's Contract* (2)), and it passed by the mere conveyance of the land notwithstanding that it was not expressly mentioned. Before the Tithe Commutation Act, 1836, tithe was regarded as a separate hereditament, which did not issue out of the land. It was held ex jure divino, under a wholly different title from the land, and consequently a conveyance of the land which did not expressly mention tithe was insufficient to pass it. In *Chapman* v. *Gatcombe* (3) where a person who owned certain land together with the tithe conveyed

(1) (1910) 102 L. T. 237. (2) [1908] 1 Ch. 213.
(3) (1836) 2 Bing. N. C. 516.

the land to trustees "together with all profits . . . . hereditaments and appurtenances to the premises belonging or in any wise appertaining . . . . and all the estate, right, title, interest . . . . of him W. Gatcombe, therein or thereto, or to any part or parcel thereof," it was held that under those words the tithe did not pass, for though the tithe was a hereditament, it was not one "to the premises belonging or appertaining," for one collateral and separate hereditament could not be appurtenant to another; nor was it an "interest" in the premises themselves. But by s. 67 of the Act of 1836 the law was altered. The land was discharged from tithe and in lieu of it a sum of money was to be payable "in the nature of a rentcharge issuing out of the lands charged therewith." That effected a change in the character of tithe. It ceased to be an independent hereditament and became an "interest" in the land out of which it issued. From that time a deed which conveyed land "together with all the vendor's interest" in it was enough to pass tithe without mentioning it, and now by s. 63, sub-s. 1, of the Conveyancing Act, 1881: "Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to, or on the property conveyed" unless a contrary intention appears. Therefore the mere conveyance of the farm to the Duchy sufficed to carry the tithe rentcharge with it. It must be conceded that even since the passing of the Act of 1881 it has always been the practice, where it was intended to sell the tithe rentcharge along with the land, to use express words for that purpose. But that practice must be regarded as due only to abundant caution.

Gavin Simonds K.C. and *Winning* for the respondents. The clue to the construction of s. 63 of the Conveyancing Act is to be found in the words "the property conveyed." Before the Act of 1836 the "all estate" clause did not pass tithe, for it only operated to convey the interest of the vendor in the hereditament purported to be conveyed, and the words of that clause were as wide as those of s. 63. The appellant

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must show that the Act of 1836 made such an alteration of the law that tithe had ceased to be a separate hereditament. This is the first time in the ninety years that have elapsed since the passing of that Act that such a suggestion has ever been made.

[He was stopped.]

BANKES L.J. I should have been very glad if I could have seen my way to reverse the judgments appealed from, but after hearing the arguments that have been addressed to us I feel myself unable to do so, and indeed am inclined to content myself with saying that I agree with the admirable judgment of the county court judge and with the reasons that he gave in support of it. The action was brought by the trustees of the settlement of the life interest of Sir Oswald Mosley against the purchaser of a farm which was sold by Sir Oswald under his statutory powers as tenant for life, the claim being for two years' rectorial tithe rentcharge issuing out of the land purchased. The Rolleston Hall Estate, of which this farm formed part, was put up for sale by auction, the farm being lot 39. In the particulars of sale there was the statement: "Outgoings: tithe 3*l.* 16*s.* 8*d.* (Tutbury); land tax 4*l.* 8*s.* 9*d.* (Tutbury)." And in the answers to the requisitions on title it was stated that the land tax and tithe as specified in the sale particulars were the only outgoings known to the vendor. That was a correct statement with regard to the amount of the vicarial tithe, but it was incorrect with regard to the tithe as a whole, for it omitted to disclose the existence of the rectorial tithe. But that misrepresentation was admitted to have been an innocent one, and consequently after the conveyance had once been executed could give no ground for relief to the purchaser.

The first point taken by Sir Herbert Cunliffe for the defendant was that the rectorial tithe in respect of which the action was brought had ceased to exist. It was said that because it had never been paid since 1859, the year in which the tithe rentcharge was bought by the then owner of

the land, it must be assumed to have been merged in the ownership of the land by means of a deed since lost. But by the Tithe Commutation Act it is an essential condition of such a merger that certain steps should be taken of which there would have been an official record if they had been taken, but of which there is in fact no record. The reason why the rentcharge has never been paid is obvious. Under the circumstances it is impossible to presume the merger suggested, and the rentcharge must be treated as still existing. Secondly, it was contended that in any case the plaintiffs are precluded from asserting its existence, by reason of the misrepresentation as to the non-existence of rectorial tithe made by the vendor. But the answer is that although they as trustees of the vendor's life interest assented to the sale, they occupied an independent position, and were not bound by the misrepresentation. There was no evidence that they knew anything about it, and the vendor was not their agent to make it. Therefore that point also fails.

Then comes what was the main question in the dispute, whether the rentcharge passed by the conveyance to the Duchy of Lancaster. It was said on behalf of the purchaser that although down to the passing of the Tithe Commutation Act tithe was looked upon as a separate hereditament, and was treated as not issuing out of the land, and consequently if a vendor of land desired to convey the tithe also it was necessary to use appropriate words to convey it as a separate hereditament, the effect of that Act was to alter the essential characteristics of tithe altogether, and to convert it from an independent hereditament into something issuing from the land, like an ordinary rentcharge. I am unable to accept that view, because it seems to me that the intention of the legislature, as indicated in s. 71, was that the essential characteristics of tithe should remain, and that every estate in the tithe rentcharge should "be subject to the same incidents as the like estate in the tithes commuted for such rentcharge." That this has been the view of the profession appears from the fact that all the text-books have so treated the Act, and no decision or expression of judicial opinion to the contrary

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has been referred to before us. I see no ground for the suggestion that the mere use of the words "issuing out of the land" has altered the law to the extent contended for. I think that *Chapman* v. *Gatcombe* (1) is still good law, and that general words such as those used in that case, "together with all the estate, right, title, interest .... of him W. Gatcombe therein or thereto or to any part or parcel thereof," are insufficient to pass tithe rentcharge. And as the object of s. 63 of the Conveyancing Act, 1881, was merely to do away with the necessity of using those general words and to treat every conveyance as if it contained them, that section does not carry the matter any further. It only enacts that the conveyance shall pass every interest, etc., which the conveying party may have in "the property conveyed," and for the reasons above given tithe rentcharge is not such an interest. The appeal must be dismissed.

SCRUTTON L.J. But for the fact that I think it fair to the counsel who have addressed us to show that I have endeavoured to arrive at an independent opinion upon the question that we have to determine I should be content to say that I concur in the very excellent judgment of the county court judge. I agree with Shearman J. and my Lord that if it were possible to decide in favour of the appellants I should like to do so, because it is quite clear that, as a matter of business and apart from any legal considerations, the trustees who are claiming this tithe rentcharge will, if they are right, get the rentcharge itself in addition to the interest on the amount by which the price of the land was increased upon the assumption that there was no tithe rentcharge payable, that is to say they will get the money twice over. But it does not necessarily follow from that that the trustees are not entitled to it.

The questions to which the case gives rise are, I think, dealt with by the county court judge in their logical order. He begins by considering whether the tithe rentcharge claimed was still in existence at the date of the conveyance

(1) 2 Bing. N. C. 516.

to the Duchy. Now it is clear that in 1859 a rectorial tithe was payable in respect of this land, and that since that date no such tithe has in fact been paid, the reason being that the land and the tithe rentcharge from that time forward belonged to the same persons. From that non-payment the Court was asked to infer that the rentcharge had been extinguished by merger. The mere possession by the same person of the tithe rentcharge and the land out of which it issues does not operate as a merger, for the Tithe Act, 1836, s. 71, requires that to constitute such a merger there must be a deed or declaration made in such form as the Tithe Commissioners approve, and in practice the Commissioners, who are now represented by the Board of Agriculture, have always required that a duplicate of the deed should be enrolled in their office, and there is no trace here of such a deed or of its enrolment. As it is obvious that there would be some record of the enrolment at the office of the Board if it had ever taken place the probability is that no such deed ever existed, and the Court cannot presume the necessary conditions of a valid merger. We must therefore assume that the tithe rentcharge was still in existence in 1920.

But then it is said that even if that is true the plaintiffs ought under the following circumstances to be estopped from alleging that fact. Sir Oswald Mosley put up the estate for sale by auction, and in his general stipulations he said: "All outgoings that are known to be paid by the vendor are stated at the end of the description of each respective lot affected thereby," and when one turns to the lot in question in this case, lot 39, one finds at the end of the particulars: "Outgoings: tithe 3*l.* 16*s.* 8*d.* (Tutbury); land tax 4*l.* 8*s.* 9*d.* (Tutbury)," that 3*l.* 16*s.* 8*d.* being, as we now know, vicarial and not rectorial tithe. But in the general stipulations Sir Oswald Mosley's advisers very prudently put in this condition: "The properties are sold subject to all . . . . outgoings of every description that may be subsisting or chargeable thereon, and the purchasers are to be deemed to have notice thereof, whether mentioned in these particulars or not."

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It is not disputed that that statement of outgoings was honest. Though the vendor had once known of the existence of the rectorial tithe he had forgotten it. The county court judge did not deal with this matter, because he thought it unnecessary to do so in view of the fact that in his opinion, even if there was a misrepresentation by the vendor, it did not bind the plaintiffs. I am disposed to go further and to say that, having regard to the above condition as to notice, there was no misrepresentation at all. But, if I am wrong in that, I still agree with the county court judge that a misstatement on the sale to the Duchy would not estop trustees, to whom the vendor had previously assigned his life interest in the property in trust for himself and others, from asserting that the tithe rentcharge existed and had passed to them by the previous assignment.

Then if the tithe rentcharge still existed in 1920 and the plaintiffs are not estopped from disputing it, what is the effect of the conveyance to the Duchy of Lancaster upon the title to that rentcharge? Down to the time of the passing of the Tithe Act, 1836, it is clear that tithe was not regarded as an interest in the land in respect of which it was payable, it was called in the language of lawyers of that day a "collateral hereditament" which was held by a different title from that of the land itself. In *Phillips* v. *Jones* (1) it is said: "Tithes were not hereditaments belonging to land, but were a separate subject of tenure, and must be held by a different title." One of the cases to which we were referred in the course of argument was *Norbury* v. *Meade* (2) in Bligh's Reports. I sent for the report and found that the copy brought me happened to be one which had formerly belonged to Park J. His signature is at the beginning of the volume, and the report is throughout noted up in the same handwriting. In the margin of that part of the report of Lord Redesdale's judgment where he was reported to have said that the grantor had not used the proper words of release Park J. says, "I do not understand what Lord R. means by releasing the tithes. Tithes are not a charge but a

(1) (1803) 3 Bos. & P. 362. (2) 3 Bli. 211, 240.

collateral inheritance"; and that statement Park J. repeats when he comes to *Chapman* v. *Gatcombe* (1), where it was clearly decided before the passing of the Act of 1836 that on a conveyance of land on which tithe was payable the tithe would not pass under the general words "all hereditaments and appurtenances to the land belonging or appertaining . . . . and all the estate, right, title, interest . . . . of him W. Gatcombe therein." But it was said that the Act of 1836 had altered the law. That Act no doubt effected a change in the mode of recovering tithe. It relieved the tithe owner of the burden of collecting his tithes in kind, and substituted a money payment varying with the price of corn. But it was never intended thereby to alter the legal incidents of tithe. This is clearly shown by the language of s. 71: "Any person having any interest in or claim to any tithes . . . . before the passing of this Act shall have the same right to or claim upon the rentcharge for which the same shall be commuted as he had to or upon the tithes, and shall be entitled to have the like remedies for recovering the same as if his right or claim to or upon the rentcharge had accrued after the commutation; provided that nothing herein contained shall give validity to any mortgage or other incumbrance which before the passing of this Act was invalid or could not be enforced; and every estate for life, or other greater estate, in any such rentcharge, shall be taken to be an estate of freehold; and every estate in any such rentcharge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rentcharge." The text-books continue to cite *Chapman* v. *Gatcombe* (1) as being still good law notwithstanding that it was decided before the passing of the Act of 1836, and none of them contain any suggestion that whereas previously to that Act a conveyance of the land did not pass the tithe as being an interest in the land itself or an appurtenance to it, such a conveyance is effectual to pass the tithe rentcharge which has been substituted for it. That being so s. 63 of the Conveyancing Act, 1881, does not assist the appellant. It

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merely renders it unnecessary any longer to include in a conveyance the long string of general words, "all the estate, right, title, interest," etc., that used to be known by the name of the "all estate clause," and, in the absence of a contrary intention appearing, treats the conveyance as containing them. The result is that the conveyance of the lands of Chapel House Farm to the Duchy of Lancaster did not carry with it the rectorial tithe rentcharge, as that rentcharge was not an "interest in" the land out of which it issued but something collateral to and independent of it. For these reasons I agree that the appeal must fail.

SARGANT L.J. I am of the same opinion. I entirely agree with what has been said by my brothers, both as to the excellence of the judgment of the county court judge in this case, and as to the desirability, if it were possible, of affording some relief to the appellant, because there can be no doubt that, owing to an innocent misrepresentation by the vendor, the Mosley Estate will retain the tithe rentcharge in question as part of its property, and at the same time will get the price of the land sold increased by the ignorance of the purchaser that it was subject to that rentcharge. But I am afraid that there is no means by which any relief can be given. I entertain no doubt that the contract was intended by both sides to be a contract for the sale of the land subject to an outgoing for tithe of 3*l.* 16*s.* 8*d.* and no more, and if the mistake had been discovered between the date of the contract and that of conveyance there would have been strong ground for the purchaser resisting specific performance, and in all probability the vendor would have been willing to make an allowance off the price representing the diminution in the capital value of the land in consequence of the existence of the rectorial tithe rentcharge. But unfortunately the matter went beyond contract and proceeded to conveyance, and when once that had taken place, the misrepresentation being admittedly an innocent one, it is well settled law, established by such cases as *Wilde* v. *Gibson* (1); *Brownlie* v. *Campbell* (2),

(1) (1848) 1 H. L. C. 605. (2) (1880) 5 App. Cas. 925.

and many others, that no relief can be granted to the purchaser either by way of rescission or by way of damages.

But then it was said that, even if no action will lie by the purchaser for damages, the misrepresentation is sufficient to estop the present plaintiffs, who are the assignees of the vendor's life interest, from alleging the existence of the tithe rentcharge, and from suing for its recovery. It may be that if Sir Oswald Mosley, after he had sold the farm to the Duchy, had assigned to the plaintiffs his life interest in the settled property, which would then, so far as this farm is concerned, be represented by the proceeds of its sale, the plaintiffs would be bound by his representations, on the footing that they were privies who derived their title from him after the date of the representation relied on as an estoppel against him. I have not considered the point, and express no opinion upon it. But such an estoppel cannot possibly arise against persons who took by a conveyance long before the making of the representation complained of. To my mind the defence of estoppel cannot be successfully raised here. Equally unavailable, it seems to me, is the defence that the tithe rentcharge has ceased to exist by reason of a presumed merger of the rentcharge in the freehold of the land. It is not disputed that this tithe rentcharge was in existence in 1859, when it was sold to Sir Oswald Mosley's predecessor, and it is a sufficient explanation of the non-payment that the rentcharge was in the hands of the person who was entitled to the land out of which it issued, so that the person to pay and the person to receive payment were the same. In that state of things and in the absence of any compliance with the statutory requirements necessary since the Act of 1836 to effect a valid merger, it seems clear that one cannot presume that the rentcharge has been legally extinguished.

Then we come to the question whether the conveyance of September 2, 1920, made by Sir Oswald Mosley under his statutory powers as tenant for life had the effect of conveying to the purchaser not only the land but also the tithe rentcharge. Now it is quite clear from the description of the parcels in the conveyance that what was being conveyed

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was physical land. (1) It is the property mentioned in the schedule, specified to contain a certain acreage and coloured pink on the plan. So far it is plain that the conveyance would not include tithe rentcharge. But it is said that this tithe rentcharge is an "interest in the land," and that by virtue of s. 63 of the Conveyancing Act, 1881, the conveyance is to be read as if these words were written in it. Now it is quite clear that before 1836 a conveyance of physical land with any number of general words added, such as "all the estate, right, property, interest, claim and demand" in the land conveyed, would not pass tithe, for the reason that tithe was a hereditament independent of and separate from the land on which it was charged, and was not an interest in it or appertaining to it. That then being the rule with regard to tithe before the year 1836, is it to be assumed that the Tithe Commutation Act, by substituting a tithe rentcharge for tithe in kind, made such an alteration in the nature of tithe that what was previously a separate hereditament collateral to the land in respect of which it was payable became a charge upon the land and an interest in it, so as to pass under a conveyance of the land itself? The object of the Act, as it has generally been understood, was to render definite that which was previously indefinite, and also to prevent landowners being deterred from improving their land by consideration of the fact that under the law as it then stood one-tenth of the value of any improvement went to the tithe owner, who had borne no share of the expense. The only section in the Act which it is suggested had the effect of making the alteration contended for is s. 67, which provides that the land is to be discharged from tithe, and that instead there shall be paid a certain sum dependent on the value realized by certain

(1) The description of the parcels in the conveyance was: "All those pieces of land and hereditaments containing in the whole 175 acres 3 roods and 8 perches or thereabouts in the parish of Tutbury in the county of Stafford .... together with the messuages buildings and cottages erected thereon which said hereditaments are more particularly described in the First Schedule hereto and are delineated on the plan annexed to these presents and are thereon coloured pink."

kinds of produce during the year, which sum is to be "in the nature of a rentcharge issuing out of the lands charged therewith." But by s. 71 it is expressly provided that the tithe rentcharge shall be held and dealt with on the same footing as the tithe for which it is substituted. Having regard to the fact that the tithe rentcharge was to be payable instead of the tithe and to the language of s. 71 I cannot think that the words "in the nature of a rentcharge issuing out of the lands charged therewith" can have any such sweeping effect as was contended for by the appellant, or that they so radically altered the nature of tithe, as to convert it from a separate hereditament which could not appertain to the land into an interest in the land or an appurtenance to it. In my judgment that was not the effect of the Act, and I think that great importance is to be attached to the fact that it has never until now been suggested that such an alteration had been made; but on the contrary the invariable practice has been to convey tithe rentcharge separately, in the same way that tithe was conveyed before the Act. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *Solicitor to the Duchy of Lancaster.*

Solicitors for the respondents: *Kirby, Millett & Ayscough, for Taylor, Simpson & Mosley, Derby.*

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Local Government—Street—Private Street Works—Objection by Frontager—Application to Justices to Determine—Postponement of Application till after Works done—Jurisdiction of Justices to Hear Objection—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 8.

In s. 8, sub-s. 1, of the Private Street Works Act, 1892, the provision that "the urban authority . . . . may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned," has reference to objections made under s. 7 to the "proposals" of the urban authority to do works not as yet done, and that court has no jurisdiction to entertain an application in respect of an objection of that kind after the works have been done.

Wirral Rural Council v. *Carter* [1903] 1 K. B. 646; *Hayles* v. *Sandown Urban Council* [1903] 1 K. B. 169; and *Pearce* v. *Maidenhead Corporation* [1907] 2 K. B. 96, observations approved.

Case stated by justices for the borough of Hythe.

The Hythe Corporation, hereinafter called "the respondents," as urban authority within their district, acting in pursuance of the Private Street Works Act, 1892, s. 6, passed, with respect to a street called Albert Road within their district, upon which the appellant's property abutted, a resolution to sewer, level, pave, metal, flag, channel, make good, and provide proper means for lighting the said street, and that the expenses incurred by the respondents in executing the works should be apportioned on the premises fronting, adjoining, or abutting on the said street in pursuance to the above section. The respondents' surveyor accordingly prepared a specification of the works with plans and sections, an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith, and the respondents by resolution approved the same respectively. The last-mentioned resolution was duly published in the manner specified in Part II. of the Schedule to the Act of 1892, and within seven days after the date of the first publication—namely, on December 29, 1923, copies of that resolution were served on the owners of the said premises, including the appellant. On January 21, 1924, an amended apportionment

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was duly served on the appellant. On January 23, 1924, the appellant, under s. 7 of the Act, served a notice in writing on the respondents objecting to the proposals of the respondents on ground (*b*) specified in that section—namely, that the street was a highway repairable by the inhabitants at large. No application to a court of summary jurisdiction under s. 8 of the Act to appoint a time for determining the matter of objections under that section was made by the respondents until after the work was completed and final apportionment made and notice thereof served. On September 1, 1925, the notice of final apportionment was served on the appellant, and on September 3, 1925, the appellant, by notice in writing to the respondents, made an objection under s. 12 of the Act to the final apportionment similar to that which he had already made to their proposals under s. 7. On July 2, 1926, the respondents under s. 8 applied to the justices, being a court of summary jurisdiction, to hear, determine, and appoint a time for determining the matter of the objection made by the appellant under s. 7.

On July 13, 1926, the date appointed by the justices in response to the application of the respondents, the matter of the said objection was heard by them on the above facts which were agreed between the parties.

It was contended on behalf of the appellant that the Act of 1892 should be construed as a whole; that s. 8, in view of the preceding and subsequent sections of the Act and of the scheme of the Act, should be read as if the words "before the commencement of the works" were inserted into the section after the words "at any time after the expiration of the said month" and before the words "may apply to the court of summary jurisdiction"; that after the final apportionment was made, and notice thereof served, the only grounds of objection which could be raised were those set out in s. 12, sub-s. 2, and that this was not consistent with the court of summary jurisdiction having power to determine an objection under s. 7 after the final apportionment; and that on these grounds the justices had no jurisdiction on July 13, 1926, to hear and determine the objection made

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by the appellant to the proposals of the respondents under s. 7.

It was contended on behalf of the respondents that the appellant was not in any way prejudiced by the hearing being delayed, as if the court decided that the street was a highway repairable by the inhabitants at large he and others would be relieved of the expenditure; and that the words in s. 8, "at any time after the expiration of the said month," must bear their ordinary interpretation, and that words could not be inserted into the section which did not appear therein.

The justices were of opinion that s. 12 of the Act was not inconsistent with construing s. 8 in the express words of that section, and that they had no right to insert words into an Act unless subsequent sections of the Act were entirely inconsistent with the ordinary construction to be placed upon the words.

C. R. Havers for the appellant. The justices had no jurisdiction under s. 8, sub-s. 1, of the Private Street Works Act, 1892, to entertain the application of the respondents under that subsection to appoint a time for determining the objection made by the appellant at the stage at which they did so, and thereupon to appoint a time and to determine the objection, and the order which they made is bad. It is true that that section does not provide in express terms that the application must be made within any prescribed time. If, however, that section and the other sections of the Act be considered together, it becomes plain that the application must be made before the works are done. Thus, by s. 6 the urban authority may require the works to be done, and may pass a resolution approving the specification, and the estimate and provisional apportionment of the expenses. By s. 7, during one month from the publication of that resolution, any frontager may object to the proposals of the urban authority on the grounds there enumerated, which include (inter alia) the grounds that the street is a highway repairable by the inhabitants at large, and that the proposed

works are insufficient or unreasonable. Then by s. 8 the urban authority at any time after the expiration of that month may apply to a court of summary jurisdiction to appoint a time for determining the objection. By s. 12, when the works have been completed there shall be a final apportionment of the expenses conclusive for all purposes, of which notice shall be given to the frontagers, who within a month may object to the final apportionment on certain grounds, not including the ground that the street is a highway. In view of these provisions s. 8 must be construed as meaning that the urban authority must make the application to the court, in pursuance of which the objections are determined, before the works are done. The objections referred to in that section are the objections specified in s. 7, which are objections to the "proposals" or "proposed works" only. These objections are different from the objections specified in s. 12 which may be made to the final apportionment after the work is done. The objection made by the appellant—namely, that this street was a highway repairable by the inhabitants at large, was an objection under s. 7 to the proposed works, and the justices had no jurisdiction under s. 8 to entertain an application in respect of that objection after the works had ceased to be merely proposed and had been actually done. A frontager is entitled to an opportunity of making his objections to the works and of having them determined while the works are as yet only proposed to be done, and to a notice of the provisional apportionment which also implies that he has that opportunity before the works are done, as otherwise his right to the notice would be worthless; and, unless the procedure in regard to these matters has been strictly followed, the urban authority are not entitled to recover the expenses from the frontager: see per Lord Alverstone C.J. in *Wirral Rural Council* v. *Carter* (1); *Hayles* v. *Sandown Urban Council* (2); and *Pearce* v. *Maidenhead Corporation*. (3)

W. M. Andrew (*A. F. Clements* with him) for the respondents.

(1) [1903] 1 K. B. 646. (2) [1903] 1 K. B. 169.
(3) [1907] 2 K. B. 96.

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The justices had jurisdiction under s. 8, sub-s. 1, of the Act of 1892 to entertain the application of the appellant and to determine his objection at the time when they did so. That sub-section should be construed in accordance with its actual terms, which are perfectly explicit. It does not expressly provide that the urban authority must make the application to the court of summary jurisdiction before the works are done or within any other defined period of time. There is no justification for reading into the sub-section the words "before the commencement of the works." By s. 12, when the works have been completed and the expenses thereof ascertained a final apportionment shall be made, and within a month after notice thereof the frontager may make objections to that apportionment. As objections under that section may be made and determined after the work has been done, objections under s. 7 may also be made and determined at that stage. The fact that the application to the court to appoint a time for determining an objection and the determination of the objection are postponed until after the works have been completed cannot prejudice the objector, because if his objection is overruled, he will rightly be required to pay the apportioned expenses, and if on the other hand his objection is sustained, the expenses will not be borne by him but by the urban authority. That is a risk which the urban authority take upon themselves and which the Act allows them to take. The observations of Lord Alverstone C.J., in the cases cited, were mere obiter dicta which were not necessary for the decision of these cases and they are not binding upon this Court.

LORD HEWART C.J. This is a case stated by justices, and it raises a point as to the construction of the words in s. 8, sub-s. 1, of the Private Street Works Act, 1892, relating to the application by the urban authority at any time after the expiration of the month therein mentioned to a court of summary jurisdiction. That point may be concisely stated to be whether the true construction of these words involves the meaning that the application is to be made

while the works are still proposed works and before they have been started upon. Reference has been made to certain observations in the cases of *Wirral Rural Council* v. *Carter* (1); *Hayles* v. *Sandown Urban Council* (2); and *Pearce* v. *Maidenhead Corporation* (3), which assume rather than hold that that is the true construction of the words. In my opinion that is the true construction of the words, and that it is so is made plain by the whole scheme of the Act and also by particular phrases to be found in its sections. The scheme of the Act is this. By s. 6, where the street is not yet sewered, levelled, paved, and made good to their satisfaction the urban authority may require the necessary works to be done, the surveyor shall thereupon prepare a specification, estimate, and provisional apportionment, and the urban authority may pass a resolution approving these documents which has to be published in the manner provided by the section. By s. 7 there is to be a month from the date of the publication of that resolution during which the owner of any premises shown in the provisional apportionment as liable to be charged with any part of the cost may by written notice object to the proposals of the urban authority on certain grounds. These grounds of objection are enumerated in the section, and one finds among them, for example, ground (*d*) that the proposed works are insufficient or unreasonable or that the estimated expenses are excessive. The work, then, to which objections may be made under that section is as yet merely a matter of proposal. Passing on to s. 8 one finds that under that section it is the duty of the urban authority to apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in the Act mentioned, that is to say, the urban authority must apply for objections to be heard to the proposed works. Then follow s. 9 as to incidental works, s. 10 as to apportionment, and then a very significant section, s. 11, by which the urban authority may from time to time amend the specification, estimate, and provisional

(1) [1903] 1 K. B. 646. (2) [1903] 1 K. B. 169.
(3) [1907] 2 K. B. 96.

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apportionment, but if the estimate be increased objections may be taken and an application shall be made to appoint a time for determining them, and the whole process is to be repeated de novo. Thus that chapter of the story, so to speak, is closed. We then pass to s. 12 beginning with the words "When any private street works have been completed" and going on to say that there should then be a final apportionment of which notice should be given to the frontagers who within a month may object to that apportionment on certain grounds. These grounds differ from those enumerated in s. 7, and do not include, for example, the ground that the street is a highway repairable by the inhabitants at large. Having regard to these provisions I do not see that the words "before the commencement of the works" are not by implication included in s. 8. In my view the scheme of the sections and the vocabulary employed in them show clearly that the application for determining objections under s. 8 is to be made before the commencement of the works, otherwise it would be grotesque to speak of these objections as being objections to "proposed" works.

It is not necessary to repeat the facts of this case. The point of them is that it was not until the whole work had been carried out, the whole expense incurred, and the final apportionment made that this particular owner of premises had an opportunity of taking the preliminary objection that this street, which he was called upon to bear a part of the cost of treating under this Act, was all the time a highway repairable by the inhabitants at large. That was not an objection which could be taken at the time of the hearing by the justices, as the works had then been done. It was an objection which arose in respect of the proposed works.

The point taken on behalf of the appellant before the justices was right—namely, that at that stage of the proceedings they were without jurisdiction to deal with the application. There seems to be some doubt as to the precise terms and effect of the order which the justices purported to make, but whatever their order was, I think that, inasmuch as it was made in circumstances in which they had no

jurisdiction to make it, it is null and void. I am, therefore, of opinion that this appeal should succeed.

AVORY J. I am of the same opinion. The only ground upon which the decision of the justices that they had jurisdiction can be supported is the ground taken by counsel for the respondents—namely, that under s. 8 of the Act of 1892 there is no limitation of time within which the urban authority may apply to a court of summary jurisdiction to appoint a time for determining objections. On consideration of that and other sections, however, I think it is clear that that provision only has relation to objections which have been made under s. 7 to the proposed works, and that it can have no application to an objection made under s. 12 to the final apportionment after the works have been completed. I further think that it is clear that in the application of s. 8 to a case such as this the word "may" has to be construed in a mandatory sense. That word is no doubt prima facie used in the permissive sense, as there may have been no objection raised and therefore no need for an application to the court of summary jurisdiction. But it is clearly contemplated that if an objection has been made under s. 7 then the urban authority shall apply to the court of summary jurisdiction, and in my opinion if they fail to do so then the justices have no jurisdiction at all to deal with any matter relating to a final apportionment.

SALTER J. I am of the same opinion. If ss. 9 and 10 of the Act are read, as it appears to me that they should be read, before ss. 7 and 8, I think it is sufficiently clear that the Legislature intended that objections to the provisional apportionment should be dealt with and disposed of before the works are begun, and I further think that that view is strengthened by a consideration of the terms of s. 11.

Appeal allowed.

Solicitors for appellant: *Rawlings, Butt & Bowyer.*

Solicitors for respondents: *John Hands & Son, for H. Stainer, Hythe.*

J. R.

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THE KING *v.* GRAIN.

Ex parte WANDSWORTH GUARDIANS.

Local Government—Superannuation Allowance—Registrar of Births and Deaths—Basis—Gratuities paid by Guardians with Sanction of Minister of Health—"Emoluments"—Disallowance and Surcharge—Poor Law Amendment Act, 1844 (7 *&* 8 *Vict. c.* 101), *s.* 32—*Poor Law Officers' Superannuation Act,* 1896 (59 *&* 60 *Vict. c.* 50), *ss.* 3, 19—*General Order for Accounts (Unions) dated January* 14, 1867, *art.* 41.

In calculating the superannuation allowance to a registrar of births and deaths guardians took into account certain gratuities paid to him by them, as being "emoluments." These gratuities had been paid on the suggestion of and were approved by the Minister of Health, to supplement the registrar's statutory income. The district auditor disallowed the portion of the superannuation allowance based on these gratuities and surcharged it, on the ground that there was no legal warrant for the gratuities and that the sanction of the Minister of Health could not legalize their payment, and that they could not, therefore, form part of the basis of the calculation of the superannuation allowance:—

Held, that as the only grounds upon which the above payment of superannuation allowance could be surcharged was that its payment amounted to improper conduct or was an illegal payment, and that it was neither, the surcharge was wrong.

Held, also (Salter J. dissenting), that the auditor had no power to disallow the portion of the superannuation allowance based upon the said payment of gratuities.

Rule Nisi for certiorari to quash orders for disallowance and surcharge.

Upon the audit of the accounts of the applicants, the Wandsworth Guardians (called herein "the guardians"), for the half-year ended September 30, 1925, by the respondent, the district auditor, H. W. Grain (called herein "the auditor"), he disallowed the sum of 27*l.* 17*s.* 1*d.*, being part of a sum of 137*l.* 1*s.* 10*d.* charged in the account in respect of one half-yearly payment of a superannuation allowance awarded to A. W. Minter, formerly registrar of births and deaths for a district situated in the Wandsworth Union (called herein "the registrar"). He also surcharged certain of the guardians and ex-guardians of the union with the said sum who had voted in favour of its payment or had not opposed it. In the

certificate of surcharge the auditor stated that the above sum of 27*l.* 17*s.* 1*d.* represented the difference between a superannuation allowance calculated under s. 3 of the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), on the registrar's average yearly income during the five years immediately preceding his resignation, and the superannuation allowance actually made to him, which had been calculated on the above average plus the average of certain gratuities paid to him by the guardians under the circumstances set out below. The auditor contended that the amount of these gratuities should not be included in the calculation. The gratuities had been paid under the following circumstances. The Local Government Board had issued a circular dated May 2, 1918, addressed (inter alios) to the guardians, suggesting certain payments to registrars of births and deaths. This was not acted on by the guardians. Subsequently, by s. 3, sub-s. 1 (*a*), of the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), all the powers and duties of the Local Government Board were transferred to the Minister of Health. The Minister by circular 91 dated May 14, 1920, addressed (inter alios) to the guardians, after referring to the above circular of May 2, 1918, suggested that gratuities to registrars of births and deaths calculated on certain principles might properly be awarded, and stated that such gratuities would be sanctioned by the Minister. The circular by clause 3 stated that the Minister "feels it his duty to remind the guardians that it is important that the case of registrars of births and deaths should be met; and he hopes that guardians will deal with these cases not less adequately than with officers eligible for war bonus." Accordingly the guardians granted the above gratuities to the registrar during the last two years of his office to meet both the increased cost of living and a decline in the amount of statutory fees received by him in respect of the duties of his office. The payment of the gratuities had been passed by the auditor at all the audits during the period in question by reason of the provisions of s. 3 of the Local Authorities (Expenses) Act, 1887 (50 & 51 Vict. c. 72), which enacts that expenses of a local authority

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sanctioned by the Local Government Board shall not be disallowed. The registrar had duly paid contributions to the superannuation fund in compliance with ss. 12 and 13 of the Poor Law Officers' Superannuation Act, 1896, the amount of the contributions being based not only on his statutory earnings but also on the amount of the gratuities as being "emoluments" within the meaning of the above sections.

The auditor held that although he could not disallow the payment of the gratuities there was no legal authority for them, and that the sanction of the Minister of Health did not legalize them, but merely had the effect of preventing their disallowance. Consequently he held that they could not form part of the basis, as "emoluments," of the calculation of the superannuation allowance, and he accordingly disallowed the above sum of 21*l.* 17*s.* 1*d.* as being the portion of the allowance based on the gratuities, and surcharged it.

On June 11, 1926, the guardians obtained this rule.

Montgomery K.C. and *Croom-Johnson* showed cause. These gratuities can only be taken into consideration in computing the superannuation allowance if they are "emoluments" within the meaning of s. 3 of the Poor Law Officers' Superannuation Act, 1896. The registrar was entitled to a superannuation allowance under s. 2 of the Act as an officer or servant in the employ of the guardians, which, though not so in fact, he was deemed to be by reason of s. 19 of the Act. By the latter section "'Emoluments' includes all fees, poundage, and other payments made to any officer or servant as such for his own use; also the money value of any apartments, rations, or other allowances in kind appertaining to his office or employment." These words point to legal payments and allowances. The payment of these gratuities cannot be justified by any legal enactment, and guardians cannot pay what they like to employees as can private employers, for they are trustees for the public of the public money. It is true that the payment cannot be disallowed, by reason of s. 3 of the Local Authorities (Expenses)

Act, 1887, but that section was only enacted to avoid the anomaly of disallowance by an auditor appointed by the Local Government Board of an item sanctioned by them. It does not have the further effect of making it a legal payment upon which the amount of superannuation allowance must be based. If not authorized by law the sanction of a Government department cannot legalize it. Payment of registrars of births and deaths is regulated by s. 29 of the Registrars of Births and Deaths Act, 1836 (6 & 7 Will. 4, c. 86), and is entirely by fees. The power of the auditor to disallow the portion of the superannuation allowance based on the gratuities is not, of course, affected by the provisions of s. 3 of the Act of 1887, but is derived from s. 32 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101) (1), and art. 41 of the General Order of the Poor Law Board, dated January 14, 1867, as to the keeping and audit of accounts in unions. (1)

[LORD HEWART C.J. Where is the power given to surcharge

(1) Poor Law Amendment Act, 1844, s. 32: "And be it enacted, that [certain persons] . . . . shall elect . . . . a person to be the auditor of the district . . . . and every auditor . . . . shall have full powers to examine, audit, allow, or disallow of accounts, and of items therein, relating to monies assessed for and applicable to the relief of the poor . . . . and to all other money applicable to such relief; and such auditor shall charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is accountable, but not brought by him into account against such person, and shall certify on the face of every account audited by him any money . . . . found by him to be due from any person; and . . . . shall forthwith report the same to the . . . . Commissioners . . . . and all monies so certified to be due by such auditor shall be recoverable as so certified from all or any of the persons making or authorizing the illegal payment or otherwise answerable for such monies. . . . ."

General Order dated January 14, 1867, art. 41: "In auditing the accounts, the auditor shall see that . . . . the payments are supported by adequate vouchers and authority; and he shall ascertain whether all sums received . . . . are brought into account; and he shall examine whether the expenditure is in all cases such as might lawfully be made; and he shall reduce such payments and charges as are exorbitant, shall surcharge moneys not duly accounted for, or lost by negligence, upon the person who ought to account for the same, or whose negligence or improper conduct has caused the loss, and shall disallow and shall strike out such payments as are contrary to the Orders, Rules, and Regulations of the Poor Law Board, or are not otherwise authorised by law."

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money paid without lawful authority apart from the case where it is paid by negligence or misconduct ?]

There is none. But under s. 32 of the Act of 1844, these sums are recoverable from the person making them if so certified by the auditor as being illegal payments, and in this sense, and this sense only are the payments made by negligence or misconduct within the section or constitute improper conduct within art. 41. The amount of the superannuation allowance in question is a " sum for which [the guardians are] accountable, but not brought by [them] into account " within the meaning of s. 32, because they only account for it by showing an illegal payment.

Wingate-Saul K.C. and *Leonard Crouch* in support. The district auditor had no power to disallow this payment. He could only do so if it represents moneys " not duly accounted for " or " lost by negligence " within art. 41 of the Order. " Not duly accounted for " means not appearing in the accounts, and has no reference to the propriety of the payment. The words deal with the income side of the account, not the expenditure side. But this payment clearly appears on the face of the accounts, and there is no question of negligence raised.

The auditor can only surcharge loss caused " by the negligence or misconduct " of the person accounting, or where a sum for which he is accountable is not brought by him into account, within s. 32 of the Act of 1844, or moneys not duly accounted for or lost by negligence or improper conduct within art. 41 of the Order. The provision in s. 32 that sums surcharged shall be recoverable from the persons " making or authorising the illegal payment," shows what is meant by " misconduct " earlier in the section in a case like the present, where no moral misconduct is suggested. These gratuities were not an illegal payment nor were they money lost by negligence. They were paid in compliance with the suggestion of the Local Government Board and Minister of Health, which bodies have very extensive powers of administration—see Halsbury's Laws of England, vol. xxii., tit. " Poor Law," para. 1082, p. 524—and the Court will be slow

to interfere, even indirectly, with their discretion. And boards of guardians themselves have a certain discretion, and it is not necessary to indicate specific Parliamentary authority to justify each item of payment made by them. In estimating the superannuation allowance the guardians had, under s. 3 of the Poor Law Officers' Superannuation Act, 1896, to take into consideration (inter alia) the registrar's "emoluments." These gratuities were "emoluments" under s. 19 of the Act as "payments made to any officer . . . . as such for his own use," and there is nothing in the section to indicate that emoluments are to be payments specifically authorized by law. Tips have been held to be "earnings" within the meaning of the Workmen's Compensation Acts. (1) These gratuities were given by the guardians in the lawful exercise of their own discretion on the suggestion of a Government department which itself holds large discretionary power, and no statute forbids their payment, and they were made to the registrar as such for his own use.

Croom-Johnson (by leave of the Court). Guardians are appointed by statute (2), and the question therefore is whether there is any power in the statute which enables them to make any given payment, not whether there is any statute to prevent them. They have power to pay their servants, but a registrar is not their servant, but only deemed to be such by s. 19 of the Act of 1896 for a particular purpose—namely, the computation of his superannuation allowance. "Other payments" in the definition of "emoluments" in the same section mean payments ejusdem generis with "fees" and "poundage," neither of which, nor the "money value of any apartments, rations, or other allowances in kind appertaining to his office or employment," are voluntary gifts. The only payments which are emoluments are those which can be enforced by action.

LORD HEWART C.J. This is an order nisi for a writ of certiorari to remove into this Court a certificate of

(1) *Penn* v. *Spiers and Pond, Ld.* [1908] 1 K. B. 766.

(2) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), as amended.

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disallowance and surcharge made by a district auditor of a sum of 27*l.* 17*s.* 1*d.*, that sum having been disallowed by him in the accounts of the guardians of the poor of the Wandsworth Union for the half-year ended September 20, 1925, and surcharged upon certain guardians and ex-guardians of the union. The grounds upon which the rule was obtained were: (1.) that the auditor had no jurisdiction to make the surcharge; (2.) that the gratuities referred to in the surcharge were emoluments within the meaning of ss. 3 and 19 of the Poor Law Officers' Superannuation Act, 1896; (3.) that the sanction of the Minister of Health legalized the gratuities; and (4.) that the superannuation allowance of 137*l.* 1*s.* had been allowed by the auditor at the five preceding audits.

The question arises out of certain gratuities granted by the guardians to the registrar of births and deaths for the purpose of meeting, on the one hand, the increased cost of living, and, on the other, the decline in the remuneration derived by the registrar from his statutory fees. Attention has been directed to two circulars from the Minister of Health dated May 2, 1918, and May 14, 1920, in which boards of guardians were not merely reminded that they might but directed that they ought to make such gratuities in order to meet these difficulties. It is said, for example, in clause 3 of the circular of May 14, 1920: "The Minister has stated on several occasions that the grant of a gratuity is within the discretion of the board of guardians, but he feels it his duty to remind the guardians that it is important that the case of registrars of births and deaths should be met; and he hopes that guardians will deal with these cases not less adequately than with officers eligible for war bonus." After the receipt of and in consequence of this circular this particular board of guardians did grant to the registrar a gratuity. Under the statutes relating to this office the registrar is entitled to a series of fees in the nature of capitation fees, and the object and effect of the gratuity were to supplement his income derived from statutory sources. The payment of this gratuity was apparent on the face of the accounts of the

guardians, and at no time was it questioned by the auditor. There were excellent reasons why it should not be questioned. By s. 3 of the Local Authorities (Expenses) Act, 1887, it is provided that "Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the [Ministry of Health]." It is common ground that this gratuity was originally suggested, was in its amount approved, and was in each way sanctioned by the Ministry of Health. There came a time, however, when a different question arose—namely, what was the appropriate amount of this poor law officer's superannuation allowance. It is provided by s. 12 of the Poor Law Officers' Superannuation Act, 1896, that "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union shall contribute annually for the purposes of this Act a percentage amount of his salary or wages and emoluments according to the scale laid down by this Act, such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the common fund of the union." It is common ground that in pursuance of that section a certain percentage amount was so deducted, and deducted not only from the fees which this officer received but also from the gratuity paid to him. In other words, it is clear that for the purpose of assessing the amount of his contribution this gratuity was treated as being an integral part of his emoluments. That it should be so treated is not surprising if one turns to s. 19 of the Act of 1896, the definition section, for it there appears that ". . . . for the purposes of this Act . . . . registrars of births and deaths . . . . are deemed to be in the service of the guardians of the union in which their districts are situated." And again in the same section: "'Emoluments' includes all fees, poundage, and other payments made to any officer or servant as such for his own use; also the money value of any apartments, rations, or other allowances in kind appertaining to his office or employment." It would have been strange if the guardians had not treated this gratuity as being part of his

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emoluments—in other words, if they had said that for the purpose of levying contributions it was an emolument, but for the purpose of assessing superannuation allowance it was not. It seems to me that this gratuity, being what it is and being paid as it was, was paid to the registrar for his own use, and that it comes within the definition of emoluments in s. 19. It is not seriously denied that it fell within that category at the time it was paid, but it is denied that it remained in that category when it came to the calculation of the basis of the superannuation allowance. It is said that in this case there was a duty on the auditor to surcharge, and to disallow this sum, being that element in the superannuation allowance which is derived from taking into account the gratuity as part of the emoluments. Mr. Montgomery, in showing cause, dealt, or assumed to deal, with disallowance and surcharge as if they were one and the same; as if, to put it in another way, this certificate of disallowance and surcharge were a certificate so described by a combined substantive, there being a hyphen between "disallowance" and "and," and another hyphen between "and" and "surcharge." Mr. Wingate-Saul, on the other hand, in support of the rule, dealt with each of these matters separately, and I will follow that course.

Reference was made to various statutes, which I need not enumerate; for sooner or later we come to s. 32 of the Poor Law Amendment Act, 1844. There was a moment in the argument when it was suggested that the ground upon which this payment was impeached was twofold; first, because made without lawful authority, and, secondly, that it was a payment made in circumstances which amounted to improper conduct. In the course of the argument these two grounds became one, and it ought clearly to be understood that at the conclusion of the argument it was definitely stated that the only sense in which that which was done was said to amount to improper conduct was that this was a payment made without lawful authority, and no more.

When one looks at s. 32 of the Act of 1844, there is

the greatest possible contrast between it and s. 247, sub-s. 7, of the Public Health Act, 1875, under which some cases have recently arisen. (1) Under that sub-section it is in the clearest possible terms provided that "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person." There is a remarkable contrast between those words and s. 32 of the Act of 1844. The latter section begins with no such general words about payments made contrary to law. It begins by saying that the auditor is to have full power to "examine, audit, allow, or disallow of accounts, and of items therein, relating to monies assessed, etc.," and he "shall charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is accountable, but not brought by him into account." Then he is to certify, and then he is to report. Side by side with that section it is natural to read the General Order for the audit of accounts dated January 14, 1867, as throwing light upon it. By art. 41 of that Order: "In auditing the accounts, the auditor shall see that they have been kept and are presented in proper form; that the particular items of receipt and expenditure are stated in sufficient detail, and that the payments are supported by adequate vouchers and authority; and he shall ascertain whether all sums received, or which ought to have been received, are brought into account; and he shall examine whether the expenditure is in all cases such as might lawfully be made; and he shall reduce such payments and charges as are exorbitant, shall surcharge moneys not duly accounted

(1) *Roberts* v. *Hopwood* [1925] A. C. 578; *Roberts* v. *Cunningham* [1925] W. N. 289; 24 L. G. R. 61.

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for, or lost by negligence, upon the person who ought to account for the same, or whose negligence or improper conduct has caused the loss." He is to ascertain, to examine, to reduce in a proper case, and in a certain limited class of cases to surcharge. Now, it is a part of the argument showing cause against the rule that any payment made without due authority of law is sufficiently covered by the words in s. 32 of the Act of 1844 " or of any sum for which any such person is accountable, but not brought by him into account." I cannot help thinking that that is a misreading of the section, which is there dealing with accountability. That is being dealt with after what has been said about deficiency and loss incurred by negligence or misconduct, and in my opinion what is being dealt with there is the failure or omission to bring into account some sum which ought to be brought into account. To say that these words are in themselves sufficient to cover any payment made without lawful authority seems to me to have two effects: (1.) to render a large part of s. 32 surplusage, and (2.) to make surplusage of the clear words with which the legislature begins s. 247, sub-s. 7, of the Act of 1875. Where, in other words, is the necessity to provide in the latter sub-section that the auditor, acting in pursuance of the section, shall disallow every item of account contrary to law and surcharge the same on the persons making or authorizing the making of the illegal payments, if the very same thing is covered by the words which shortly afterwards follow: " any sum which ought to have been but is not brought into the account by that person "—words practically identical with the words in s. 32, which are said to be sufficient to cover a payment made without authority of law ? I think that the argument fails and that there is in s. 32 of the Act of 1844 no power given to the district auditor to surcharge a sum merely because it appears to him to have been made without lawful authority in a case where he is not prepared to say further that it represents a deficiency incurred through the negligence or misconduct of the person accounting. Therefore, so far as the surcharge is concerned it appears to me on the facts of this

case and on the true construction of the statute that the auditor had not the power to surcharge.

If and so far as the question of disallowance is a separate question, there is great force in the argument of counsel in support of the rule that this gratuity formed part of the emoluments of this office. I do not think that the Local Government Board and the Ministry of Health, when they sent out the circulars I have referred to, were inviting boards of guardians to make illegal payments; they were, at any rate in terms, inviting them to make payments which they said were in their discretion, and they purported to be reminding boards of guardians of what they represented as a duty. The question whether, apart from anything which arose in 1918 or 1920 there was power in a board of guardians to supplement, in a proper case, the statutory fees of a registrar of births and deaths has not been fully argued, but on the evidence, which is undisputed, I am not prepared to say that the payment of these gratuities was illegal. It is common ground that they could not be questioned by the district auditor at the time they were made, because of the provisions of s. 3 of the Act of 1887. I am not in the least satisfied that they were illegal, and it seems to me clear that they became part of the emoluments and as such entered into the figure upon which not only was the registrar's contribution to the fund to be calculated, but also the amount he was to receive out of the fund. For these reasons, among others, I am of opinion that this surcharge was wrong and that the disallowance was wrong, and that this rule should be made absolute.

AVORY J. I agree that the rule should go for the purpose of quashing this disallowance and surcharge. I agree entirely with the judgment delivered by my Lord, and for the purpose of my own judgment I do not propose to make any distinction between the disallowance and the surcharge. The auditor has given us his reasons for the disallowance, and then surcharges the persons who sanctioned the payment he has disallowed. I think that it must be borne in mind in

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considering the effect of the Poor Law Officers' Superannuation Act, 1896, that under the original Act, that is, the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), under s. 29 of which Act registrars are paid, the guardians are the paymasters, and in that sense, therefore, there is a relation of employer and employee between the guardians and the registrar, although the guardians are only to pay fees on a certain fixed scale; but by s. 19 of the Act of 1896, which Act fixes the superannuation allowance, it is clear that the registrar is to be for the purpose of that Act deemed to be in the service of the guardians. Sect. 2 of the Act of 1896 provides that every officer in the service of the guardians shall be entitled under certain conditions to a superannuation allowance, the scale of which is fixed by s. 3, and in fixing the amount of the allowance the guardians are to take into account the salary or wages and the emoluments of that officer during the five years ending on the quarter day immediately preceding the day on which he ceased to hold office. Therefore the question would appear at first sight quite a simple one—namely, what were the wages or salary and emoluments that the officer was receiving during that period. Looking at the definition of "emoluments" in s. 19 of the Act of 1896, and particularly also in view of the recent decision of the House of Lords in *Salford Guardians* v. *Dewhurst* (1), I cannot doubt that this gratuity was a part of the emoluments of his office. That being so, the auditor finds that the inclusion of the gratuity in the computation for superannuation allowance was illegal, on the ground that, although the sanction of the Minister of Health had been given to the payment, the only effect of that was, not to legalize it and to make it an emolument, but merely to prevent its disallowance at audit; in other words he comes to the conclusion that although by law he could not at the annual or six monthly audit disallow the payment of the gratuity, when he comes to consider whether the superannuation allowance is a proper one he may disallow this same gratuity. But as my Lord has pointed out, he has to

(1) [1926] A. C. 619.

justify his disallowance under s. 32 of the Poor Law Amendment Act, 1844, and in my view, giving the most liberal construction to that section, I do not think it can be said that these gratuities were either moneys that represented a deficiency or loss incurred by the negligence or misconduct of the guardians, or sums for which the guardians were accountable but not brought by them into account, nor were they, in my opinion, within the meaning of the section, moneys which can be described as illegal payments within the meaning of that section. For these reasons, shortly, while agreeing entirely with all the other reasons given by my Lord, I think that this disallowance and surcharge should be quashed.

SALTER J. I agree that this rule should be made absolute to quash the surcharge. The applicants for the rule, however, have asked in addition for a rule to quash the disallowance. The auditor has dealt with the two matters as I think he was bound to do, quite separately. He has powers to disallow and powers to surcharge which are quite distinct. He has given his reasons, first, for the disallowance and then his reasons for the surcharge. I think that his reasons for the surcharge are insufficient.

With regard to the disallowance I think he was right, for the reasons he gives, and indeed, I think that if he had failed to disallow this item he would have failed to discharge the duty imposed upon him by law. That duty is imposed first by s. 32 of the Act of 1844, and then, much more briefly, in art. 41 of the General Order for the accounts of unions of January 14, 1867. No one has disputed the validity of the article, and it will be quite sufficient to refer to that, the only material words being "In auditing the accounts the auditor . . . . shall disallow and shall strike out such payments as are . . . . not . . . . authorised by law." It rests, therefore, upon the applicants for this rule to show that the payment now challenged was a payment authorized by law. If they fail to do so then they fail to succeed as to this part of the matter. No one suggests that the common law

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authorizes this payment. It is a question of statutory authorization, and two statutes have been relied upon. Before I deal with the first of them it will be convenient to deal with the Births and Deaths Registration Act, 1836, which by s. 7 deals with the appointment, and by s. 29 with the remuneration of registrars of births and deaths. It is sufficient to say that it seems to me that as a result of that statute the registrar is not a servant of the guardians, and that he is an officer to be paid solely by piecework. That being so the first statute to refer to, although not the first in date, is the Poor Law Officers' Superannuation Act, 1896, which makes this superannuation allowance authorized by law. The sole object of that Act was to provide pensions for poor law officers and servants and for their contribution thereto. It provides by s. 2 that every officer and servant in the service or employment of the guardians shall in certain circumstances be entitled to a pension. Sect. 3 provides for the ascertainment of its amount, proportioned according to length of service, salary or wages and emoluments during a certain period. Then comes s. 19, the definition section. "'Officer' includes every officer in the service of an authority to whom this Act applies whether his whole time is devoted to the duties of his office or not; and for the purposes of this Act . . . . registrars of births and deaths . . . . are deemed to be in the service of the guardians of the union in which their districts are situated." That, it seems to me, quite clearly does not establish any relation of master and servant between the registrar and the guardians. It does not impose upon the registrar any duty of obedience or any of the other characteristic duties of a servant, or impose upon the guardians any of the liabilities of employers or any of the rights of employers, and among other things I think it does not give to the guardians any discretion as employers to alter the scale of pay fixed by statute, or the method of pay fixed by statute, for their officers. Then in the same section "'Emoluments' includes all fees, poundage, and other payments made to any officer or servant as such for his own use; also the money value of any apartments, rations, or

other allowances in kind appertaining to his office or employment." It appears to me that that cannot include any sums or advantages which he in fact gets independently of the question whether he does so with the sanction of the law or without it. It must mean sums paid to him within the law, and the case of *Salford Guardians* v. *Dewhurst* (1) in the House of Lords, which was referred to, was a case where the gratuity held to be part of the emoluments was one paid by people who had a right to expend the public money in that way and received by persons who had a right to receive it. Therefore, as far as the Act of 1896 is concerned, it does not appear to me to show that this payment is one authorized by law, and I think it is directed to altogether different matters.

The other statute relied on is the Local Authorities (Expenses) Act, 1887. That is an Act to amend the law relating to expenses of local authorities, and it provides that expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if sanctioned by the Local Government Board, now the Ministry of Health. I will not discuss whether the Ministry of Health have sanctioned this payment or not. If they have, the section is invoked as showing that this is a payment authorized by law. The question, therefore, is whether Parliament intended that a local authority may, within the law, expend public funds in any manner sanctioned by the public department which controls them. It would require, to my mind, very wide words indeed to bring about so startling a result. It would be a very dangerous reading and would open the door to oppression. It seems to me that this statute means no more than I think it says, that Local Government Board auditors are not to disallow that which their board has sanctioned. It deals with auditing methods. Mr. Wingate-Saul, in support, shrank from reading this statute in the wide sense to which I have just referred, and said that it meant that local authorities might lawfully expend the public

(1) [1926] A. C. 619.

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money in any manner reasonably sanctioned by the public department. Who is to decide whether the sanction is reasonable; is it to be the auditor or is it to be a court of law? I do not think that such a reading is possible, and I do not think that s. 3 of this statute in any way makes this payment a payment authorized by law.

The first ground upon which the rule was moved is that the district auditor had no jurisdiction to make the surcharge. I agree that he had none. The second ground is that the gratuities referred to in the surcharge were emoluments within the Act. I do not think that they were. The third is that the sanction of the Minister of Health legalized the payment. If that means that it made the payments payments sanctioned by law, I do not think that it did. The fourth is that the superannuation allowance was allowed in previous audits. I cannot think that the fact that this auditor had omitted to do his duty before prevents him from doing it now. For these reasons I have thought it necessary, although the matter may not in this case be of much practical importance, to give my reasons for holding that the district auditor was right in disallowing, though wrong in surcharging, this sum.

Rule absolute.

Solicitors showing cause: *Sharpe, Pritchard & Co.*
Solicitors in support: *W. W. Young, Sons & Ward.*

W. L. L. B.

THE KING *v.* LEICESTER JUSTICES.

Ex parte ALLBRIGHTON.

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Nov. 11, 15;
Dec. 20.

Licensing—Justices—Bias—Renewal of Licence—Objection originated by Licensing Justices—Reference to Compensation Authority—Right of such Justices to sit on Compensation Tribunal—Certiorari—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 19.

The mere fact that a licensing justice has originated an objection to the renewal of a licence, which, consequently, is referred by him and other justices to the compensation authority, does not disqualify him by reason of interest from sitting and adjudicating, as a member of that authority, upon the matter of that licence.

RULE NISI for certiorari.

The applicant, Allbrighton, was the licensee of the "Hen and Chickens" Inn in the city of Leicester. At the general annual licensing meeting held on February 10, 1926, four of the justices, acting as the licensing committee for the city, orally objected to the renewal (inter alia) of the old on-licence of the "Hen and Chickens," on the grounds: (1.) that having regard to the character and necessities of the neighbourhood and the number of licensed houses in the immediate vicinity the licence which was then held in respect of the said premises was unnecessary; (2.) that in the interests of the public the renewal of the licence was not desirable. The application for the renewal was accordingly adjourned and the applicant was duly notified of the objection. At the adjourned meeting on March 10, 1926, the said four justices, after hearing evidence on oath, and being of opinion that the question of the renewal of the licence required consideration on the above mentioned grounds, being grounds other than those on which the renewal of an old on-licence could be refused by them (1), referred the matter to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, and made their report to that authority, suggesting that the renewal of the licence should be refused. At the principal meeting of the compensation authority on May 19,

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 18, and Sch. II., Second Part.

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1926, fourteen justices attended, and ten of them, including the said four justices, adjudicated upon the application, and having heard evidence on oath, and counsel on behalf of the applicant having addressed them, the compensation authority, including the said four justices, refused the renewal of the licence, subject to the payment of compensation.

The applicant then obtained this rule calling on the justices to show cause why their order refusing the renewal should not be removed into this Court to be quashed.

Montgomery K.C. and *Douglas Jenkins* showed cause. It is contended by the applicant who obtained this rule that because the four justices who sat as members of the compensation authority had themselves originated the objection to the renewal of the applicant's licence, they were disqualified to sit as such members by reason of interest. No doubt that fact would be sufficient to establish a suspicion of bias if they were acting as justices in the ordinary way, but as Collins M.R. said in *Rex* v. *Howard* (1) the standard to be applied is not that applicable to judges dealing with litigation. *Reg.* v. *Farquhar* (2) demonstrated the right of justices themselves to make an objection to the renewal of a licence, and it is a common practice for such objections to be made. In objecting to this licence, therefore, these justices were only doing what the law justified them in doing. And apart from the present question of bias, they were entitled to sit as members of the compensation authority: see *Rex* v. *Cheshire Licensing Justices.* (3) Nothing in the Licensing (Consolidation) Act, 1910, prevented them from doing so, and the Legislature passed the Act after the law was settled as above stated. In *Frome United Breweries Co.* v. *Bath Justices* (4) the justices had done more than to merely object and report to the compensation authority; they had instructed a solicitor to support their objection before themselves as adjudicators thereon.

[He was stopped.]

(1) [1902] 2 K. B. 363, 375.
(2) (1874) L. R. 9 Q. B. 258.
(3) [1906] 1 K. B. 362.
(4) [1926] A. C. 586.

Sir H. Maddocks K.C. and *C. E. Loseby* in support. It is admitted that justices may originate an objection, and that they may instruct a solicitor to support their view before the compensation authority. But they are then in the position of people who are objectors, and if they subsequently sit in the matter as adjudicators it is clear that they will be under the suspicion of not being impartial. They will seem to be at once prosecutors and judges. The whole effect of the speeches in the House of Lords in the *Bath Justices* case (1) is that justices must not outrage the public sentiment in its expectation of justice. *Rex* v. *Howard* (2) was wrongly decided. Sect. 19, sub-s. 2, of the Act of 1910, which enables the compensation authority to hear the licensing justices, must contemplate that the latter will not be sitting as members of the authority, for it would be contrary to justice for them to give evidence and then return to the bench and adjudicate upon that evidence: see *Mitchell* v. *Croydon Justices.* (3) Sect. 19, sub-s. 2, therefore, to that extent supports the applicant's contention.

[LORD HEWART C.J. The Legislature says that licensing justices may object, and it also says that licensing justices may sit on the compensation authority. Is it not a strong thing to say that the Legislature disqualifies a justice from doing one of these two things because he has done the other?]

That point was dealt with in *Reg.* v. *Lee* (4), where it was held that although authorized by law to act in two capacities, that of prosecutor and that of judge, a justice so acting in a particular case was disqualified for bias.

[AVORY J. What is the difference between a justice who has formed his own opinion that a licence should be referred, and one who, having heard the objection of somebody else, has come to the same conclusion? In the latter case it is admitted that he could sit on the compensation authority.]

There is a greater likelihood of bias, and the same opprobrium would not attach.

LORD HEWART C.J. We are all of opinion that the rule

(1) [1926] A. C. 586.
(2) [1902] 2 K. B. 363.
(3) (1914) 30 Times L. R. 526.
(4) (1882) 9 Q. B. D. 394.

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should be discharged, but in view of the importance of the matter we will put our opinion in writing.

1926. Dec. 20. The following judgments were read.

LORD HEWART C.J. This is a rule nisi for a writ of certiorari to remove into this Court to be quashed an order made by the justices for the city of Leicester, acting as the compensation authority for that city, on May 19, 1926, whereby the renewal of the licence of the " Hen and Chickens " Inn in the said city was refused subject to the payment of compensation under the Licensing (Consolidation) Act, 1910. The only ground relied upon in support of the rule was that the proceedings of the compensation authority were vitiated for the reason that four of the justices sitting were, it was said, disqualified by interest.

The facts are shortly as follows. At the general annual licensing meeting held on February 10, 1926, the four justices in question, as the licensing committee for the said city, orally objected to the renewal of four old on-licences, including that of the " Hen and Chickens " Inn, on the grounds, in the case of each house: (1.) that having regard to the character and necessities of the neighbourhood and the number of licensed houses in the immediate vicinity the licence which was then held in respect of the said premises was unnecessary; (2.) that in the interests of the public the renewal of the licence was not desirable. These applications were accordingly adjourned, and the applicants were duly notified of the objection, and at the adjourned meeting on March 10, 1926, the said licensing committee, after hearing evidence on oath, and being of the opinion that the question of the renewal of the licences required consideration on the above mentioned grounds, being grounds other than those on which the renewal of an old on-licence could be refused by them, decided to refer the matter to the compensation authority under s. 19 of the Act, and duly made their report to that authority, suggesting that the renewals of the licences should be refused. At the principal meeting of the compensation authority held on May 19, 1926, fourteen justices, including the four justices

who had sat as the licensing committee, attended, and ten of them, including the said four justices, finally adjudicated upon the applications referred to them. After having heard evidence on oath, and counsel having addressed them on behalf of the applicant, the compensation authority refused the renewal of the licence of the "Hen and Chickens" subject to the payment of compensation.

In these circumstances it is contended on behalf of the applicant that the mere fact of the four justices who sat on the licensing committee having originated the objection to the renewal of the licence disqualified them from sitting as members of the compensation authority, and that the principle that the same person cannot act as prosecutor and judge applies. It is not suggested that the justices objected or took any other part in opposing the renewal of the licence, except by sitting and voting as members of the licensing committee and of the compensation authority.

In my opinion the case is concluded by the decision in *Rex* v. *Howard* (1), where it was treated as settled law that justices were entitled to take objection to the renewal of licences, and afterwards to take part in hearing the applications and deciding on the question of renewal. Cozens-Hardy L.J. said (2): "The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of Lords held in *Boulter* v. *Kent Justices* (3) that there is no lis between an objector and a licence holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he must be prepared to deal with certain specified points. . . . . [The justices] . . . . were not adjudicating upon any rights. They were not prosecutors. In truth, there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred."

(1) [1902] 2 K. B. 363. (2) [1902] 2 K. B. 382, 383.
(3) [1897] A. C. 556.

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Lord Hewart C.J.

The recent decision of the House of Lords in *Frome United Breweries Co.* v. *Bath Justices* (1) was based on the fact that three of the justices who sat and voted as members of the compensation authority had been parties to a resolution of the licensing justices authorizing a solicitor to appear before the compensation authority and oppose the renewal of a licence on their behalf, and that such solicitor had appeared and opposed the renewal; and there is nothing in the decision which is inconsistent with the view that a justice who originates an objection is not, for that reason alone, disqualified from afterwards sitting as a member of the licensing authority who deals with the application for renewal, and if the question of renewal is referred for decision to the compensation authority, of sitting as a member of that authority. In doing so he is merely carrying out his duties in accordance with the scheme prescribed by the Legislature.

In my opinion, therefore, the rule should be discharged with costs.

AVORY J. [after stating the facts:] It is not suggested that the licensing justices who had referred the matter to the compensation authority were represented by counsel or solicitor at the hearing, or that they did anything more than sit and vote upon the question of the renewal; but the contention on behalf of the applicant is that the fact of the objection to the renewal having been initiated by the justices themselves of itself disqualified them from taking part in the decision of the compensation authority.

The right of the justices themselves to start an objection, particularly of the nature of the objections in this case, has been recognized ever since the decision in the case of *Rex* v. *Howard* (2), and as was pointed out in the judgments in that case, in starting an objection justices do not take sides or assume the position of parties but are merely taking the steps which the Legislature has prescribed for the better discharge of their licensing duties, which are administrative in character but have to be performed in a quasi-judicial manner. If the

(1) [1926] A. C. 586. (2) [1902] 2 K. B. 363.

applicant were right in his contention it would follow that the licensing committee would be disqualified from referring the matter to the compensation authority or from sitting as members of the compensation authority. It is suggested that the contention of the applicant is supported by the recent decision of the House of Lords in *Frome United Breweries Co.* v. *Bath Justices* (1), but the ground of the decision in that case was that the licensing justices had themselves actively opposed the renewal of the licence before the compensation authority, and instructed a solicitor to do so on their behalf, and in the opinions delivered by the Lord Chancellor and Lord Sumner the right of the licensing justices, who have referred the matter, to sit as members of the compensation authority and to take part in the argument and if necessary to be represented, is expressly recognized (2); and although the case of *Rex* v. *Howard* (3) was cited in the argument, there is no trace of any dissent from that decision, which has been followed in practice ever since 1902.

If it is conceded that the licensing justices have the right to initiate the objection and to refer the matter to the compensation authority, and if it is further conceded that the same justices have the right to sit and vote on the matter at the meeting of the compensation authority, it appears to be a contradiction in terms to say that they are disqualified because they initiated the objection. It is suggested in the applicant's affidavit that the clerk to the licensing justices gave some promise that if alterations were made in the premises the licensing justices would not oppose the renewal at the meeting of the compensation authority. In view of the affidavit of the clerk to the justices I do not think any such promise was made, but if it had been made with the authority of the justices it would negative any idea of bias on their part against the applicant.

I think there is no ground for the contention that in the circumstances of this case these justices were disqualified

(1) [1926] A. C. 586. (2) [1926] A. C. 592, 613.
(3) [1902] 2 K. B. 363.

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by reason of interest and that the rule should be discharged with costs.

SALTER J. I agree. As this appeal raises a point of much practical importance I will give my reasons.

So far as bias and likelihood of bias are concerned, I can see little difference between those who give notice of intention to oppose the renewal of a particular licence and those who give notice that they object to the renewal of that licence. There may be some difference in degree, but I can see none in kind. Neither an objector nor an opponent is a "party" to any "litigation," but each is a person who has publicly expressed an opinion that the particular licence should not be renewed and a desire that it shall not be renewed. If he is then called upon to decide, on evidence, whether that licence shall be renewed or not, it seems to me that he must approach his task with a mind definitely predisposed to non-renewal.

In *Frome United Breweries Co.* v. *Bath Justices* (1) the licensing justices had a right as citizens (a right recognized but not conferred by the statute) to appear before the compensation authority and be heard as supporters or opponents of the renewal of the licence under consideration. They also had a statutory right to sit as members of the compensation authority. But inasmuch as there was likelihood of bias the House of Lords held that both these rights should not be exercised in the same matter. In the present case also the licensing justices as a body have a right, like any other body of citizens, to object to the renewal of the licence now in question, and they have a statutory right to sit on the compensation authority. Since there is in this case, as I think, a clear likelihood of bias, it follows that they are not qualified to sit on the compensation authority, if the principle of the *Bath Justices* case (1) is applicable to this case. I think it is not applicable. In my opinion this case cannot be distinguished from the *Bath Justices* case (1) on the ground that the likelihood of bias is stronger in one case

(1) [1926] A. C. 586.

than the other. The distinction is that, in that case, Parliament had not sanctioned what was done: in this case it has. This case is governed by the reasoning in *Rex* v. *Howard*. (1) That case was relied on and cited at length by Bankes L.J. in the Court of Appeal in the *Bath Justices* case (2), and there is nothing in the judgments in the House of Lords to suggest that it was not rightly decided. It is true that there is a difference—I think a great difference—between the objection in *Rex* v. *Howard* (1) and the objection in this. The course taken by the justices in that case was carefully calculated to avoid any suggestion of discrimination, or of a view unfavourable to any particular licence. That is very different from selecting a particular licence for objection. That case was partly decided, and I think might have been wholly decided, on the ground that there was no evidence whatever of any likelihood of bias. The justices had been careful to avoid it. But it was also decided on the ground applicable here—namely, that some risk of bias is inseparable from the machinery which Parliament has set up. In *Rex* v. *Howard* Collins M.R., after dealing with the practice of the licensing justices to initiate objections to renewals, says (3): "I think, therefore, that the practice"—of justices themselves originating objections—"is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges, in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson* v. *General Council of Medical Education and Registration* (4) and *Allinson* v. *General Council of Medical Education and Registration* (5) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are

(1) [1902] 2 K. B. 363.
(2) [1925] 1 K. B. 685, 695.
(3) [1902] 2 K. B. 377.
(4) (1889) 43 Ch. D. 366.
(5) [1894] 1 Q. B. 750.

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not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them."

The second ground is not so fully applicable to this case as it was to the facts of that case, but the first ground is, I think, decisive of the present case. The right of licensing justices "to be at one and the same time objectors and judges, in the sense in which they are judges in such matters" is recognized by Parliament: *Rex* v. *Howard*. (1) It was there held that the licensing justices who have initiated objections to the renewal of licences are qualified to determine finally, on evidence, whether those licences shall be renewed or not. If they were so qualified before the Licensing (Consolidation) Act, 1910, they cannot have lost the qualification because the renewal of old on-licences is now determined in two stages by a preliminary and a final tribunal, of both of which they are members.

I think this rule should be discharged, not because there was no likelihood of bias, but because this decision was reached in a manner contemplated and sanctioned by Parliament, and cannot, therefore, be set aside.

Rule discharged. (2)

Solicitors showing cause: *Field, Roscoe & Co., for W. J. Day, Leicester.*

Solicitor in support: *B. Wilkinson, for Parsons, Son & Skillington, Leicester.*

(1) [1902] 1 K. B. 363, 377.

(2) For the purpose of calculating the time for appeal the Lord Chief Justice directed that this day (December 20, 1926) should be treated as that on which judgment was delivered.

W. L. L. B.

MANCOMUNIDAD DEL VAPOR FRUMIZ *v.* ROYAL EXCHANGE ASSURANCE.

1926
Dec. 2.

[1925. C. 1791.]

Insurance (Marine) Policy—Collision Clause—"Free of particular average absolutely" Time Clauses—"Any object (ice included) other than water."

A time policy of marine insurance contained (inter alia) the following clause: "Subject to the Institute 'free of particular average absolutely' time clauses as annexed, but this insurance to include damage received by collision with any object (ice included) other than water." The vessel while on a voyage was damaged by contact with rocky ground off the west coast of Scotland. She became stranded, and while stranded sustained further damage:—

Held, that the contact amounted to a "collision" with an "object" within the policy, and that the plaintiffs were entitled to recover the whole of the resulting damage.

ACTION in the Commercial List before Roche J.

The plaintiffs, as owners, were interested to the full amount in a policy of marine insurance dated January 14, 1924, on hull and machinery of the steamship *Frumiz* against ordinary marine perils for a period from January 1, 1924, until October 8, 1924. The policy contained (inter alia) a clause as follows: "Subject to the Institute 'free of particular average absolutely' time clauses as annexed, but this insurance to include damage received by collision with any object (ice included) other than water."

On September 22, 1924, the *Frumiz* stranded in Cuan Sound off the west coast of Scotland, and whilst so stranded damaged her bottom plates by bumping. The damage, with general average and salvage charges, was said to amount to 5553*l.*, of which the proportion claimed from the defendants was 106*l.*

The points of defence, so far as here material, were that the damage was particular average, for which the defendants were not liable under the policy, and also that it was not caused by collision with "any object (ice included) other than water" within the meaning of the policy.

Robertson Dunlop K.C. and *Stranger* for the plaintiffs. The insurance here is not against collision only, but against

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collision with "any object." That includes the risk if striking against not merely floating or navigable objects, but also natural objects and obstructions, such as the rocky ground: Arnould on Marine Insurance, 11th ed., vol. ii., section 826. The word "objects" covers anything extraneous to the ship, whether solid or fluid, other than water, which is expressly excepted so as to exclude damage from heavy seas. The stranding of the ship does not affect the liability under the policy, provided the damage was caused while the ship was in motion.

[They referred to *The Munroe* (1); *Union Marine Insurance Co.* v. *Borwick* (2); *Chandler* v. *Blogg* (3); and *The Normandy*. (4)]

The exclusion of one natural object in the present policy from the collision clause and the inclusion of another is an indication that other natural objects were intended to be included.

Raeburn K.C. and *W. L. McNair* for the defendants. The words of the policy, "collision with any object," must be construed together and not separately. We admit that if the initial damage caused by the ship's contact with the rocky ground is within the policy, the subsequent damage caused by bumping is also within it: *Reischer* v. *Borwick*. (5) As to the cases cited, *The Munroe* (1) and *Chandler* v. *Blogg* (3) were decided upon different facts and do not apply here. In *The Normandy* (4) Gorell Barnes J. speaks of a collision as not being a mere striking against, but a "striking together," and he says it is "more correct to speak of a vessel stranding or running or striking upon or against rocks or the shore than colliding therewith." In *Richardson* v. *Burrows* (6), cited in Lowndes on Marine Insurance, 2nd ed., p. 199, Lord Coleridge C.J. held that "collision" meant collision with another ship and not collision with a rock or sandbank or floating wreck.

In *Hough* v. *Head* (7) Grove J. said: "Collision appears

(1) [1893] P. 248.
(2) [1895] 2 Q. B. 279.
(3) [1898] 1 Q. B. 32.
(4) [1904] P. 187, 198.
(5) [1894] 2 Q. B. 548.
(6) Reported in note to *The Normandy* [1904] P. 187, p. 198.
(7) (1885) 5 Asp. M. L. C. 447, 450.

to me to contemplate the case of a vessel striking another ship or boat, or floating buoy, or other navigable matter, something navigated, and coming into contact with it. It, so to speak, imports as it were two things. It may be that one is active and the other is passive, but still in one sense they each strike the other." The authorities are considered in an American case, *Lehigh and Wilkes-Barre Coal Co.* v. *Globe and Rutgers Fire Insurance Co.* (1) In order to succeed the plaintiffs here must show that if a stationary vessel is caused to bump by a violent storm there is a "collision with an object" within the meaning of the policy. This involves too wide a construction of the words. For if such a construction were right the fall of a derrick into the hold might constitute a collision.

By the words "free of particular average absolutely" the persons who drew this policy intended to exclude particular average arising from special clauses, such as stranding, sinking, or burning. Here the "Free of particular average absolutely" Institute time clauses are incorporated, as contrasted with the "Free of particular average unless" clauses. In the latter the underwriters are responsible if the ship is stranded, sunk, or burnt. In the "absolute" clauses the underwriters are not so liable, for stranding is expressly excluded. This being so and the "Free of particular average absolute" clauses being here adopted, the damage is prima facie not covered by the policy, nor is there any clause which would displace this presumption so as to bring it within the policy.

Stranger in reply. By the exclusion of water as an object within the collision clause the onus is placed on the shipowners to show that the collision was with water, in which case alone they are protected. The object of the provision was to protect them against liability for a mere "touch and go" contact.

ROCHE J. This case arises from and depends upon the construction of a policy of marine insurance. The plaintiffs

(1) (1925) 26 Ll. L. Rep. 82; 6 Fed. Rep. (2nd ser.) 736.

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are shipowners and the plaintiffs' vessel, a Spanish vessel called the *Frumiz*, was insured under a time policy, underwritten by the defendant company. The policy contained a stipulation that the insurance included damage received "by collision with any object (ice included) other than water." The vessel did sustain damage during the time period which was covered by the policy. That damage was occasioned by contact with rocky ground. The question in this case is, whether that contact constituted, and amounted to, collision with an object, within the meaning of this policy?

I hope I have made it plain beyond dispute that I am not stating the question to be whether that contact amounted to collision, but whether it amounted to collision with an object, within the meaning of this policy.

The facts, which depend mainly upon the documents in the case, were that on the morning of September 22, 1924, this vessel, after being anchored in a sheltered place off the west coast of Scotland, because of weather difficulties whilst she was prosecuting a voyage from Glasgow to Methil, round the north of Scotland, got under way, and whilst proceeding through a narrow channel between the Island of Seil and the Island of Luing and approaching a passage called the Cuan Sound, took a sheer, or as the log is translated, a lurch to starboard, and struck or came upon the ground, which was undoubtedly in that neighbourhood of a rocky nature. It is clear that in the course of and by reason of so coming in contact with the ground, the vessel sustained some damage. The vessel did not merely touch the ground, but she remained upon the ground, so that within almost any sense of the word "stranding," as used in documents of marine insurance and of similar nature, the vessel became and was a stranded vessel. Whilst she was so stranded, the weather got worse and the vessel worked and bumped upon the ground, and much more extensive damage was caused to the vessel than was occasioned by the original contact with the ground. Various steps were taken to get the vessel off, and it is not disputed that in the course of the taking of such steps, certain general average expenses were incurred. For the general average

expenses the defendant company does not dispute its liability. The question is, whether the defendant company is liable for the damage occasioned apart from, and irrespective of, the general average sacrifices which were made?

The defendant company disputes its liability for such damage on the ground that it is a particular average which is excluded by this policy, because, on the submission of the defendant company, what happened did not amount to a collision within the meaning of this policy. The plaintiffs affirm that the damage is recoverable on the ground that what happened constituted a collision with an object within the meaning of this policy.

Some discussion has taken place as to whether the damage can be separated, that is to say, whether the damage first caused is recoverable by the plaintiffs, but not the further damage caused while the vessel was working on the ground. In my view, counsel for the defendants took a right course in law, when he admitted that the damage could not really be separated. If the initial damage was within the policy, then the whole of the damage was within the policy, for the reason that the principle enunciated in cases such as *Reischer* v. *Borwick* (1) applied—namely, that one must look at the real cause of the loss, and then all that flows from that as a natural consequence of it is also within its ambit. Accordingly, if I hold that the initial contact is a collision with an object within the meaning of the policy, I shall also hold that all the damage sustained while the vessel was on the ground is recoverable on the principle which I have mentioned, and not on any view that the subsequent working of the vessel on the ground constitutes fresh collisions within the meaning of the policy.

The real question here is one of great difficulty. There is no doubt that for many purposes, both in Acts of Parliament and in many documents, "collision" has a sense much narrower than is necessary to include this casualty within its ambit. Gorell Barnes J. in *The Normandy* (2) said: "I may here observe that the true meaning of collision is not a mere

(1) [1894] 2 Q. B. 548. (2) [1904] P. 187, 198.

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striking against, but a striking together; and to me it seems more correct to speak of a vessel stranding, or running, or striking upon or against rocks or the shore, than colliding therewith." From those observations as to the meaning of the word "collision" I should not venture or desire to dissent; but that is not quite the question which I have to decide. Similar limitation upon the meaning of the word "collision" was put by Grove J. in *Hough* v. *Head*. (1) Further, a limited construction upon the word "collision" in the particular document then being construed was adopted by Lord Coleridge C.J. in the case of *Richardson* v. *Burrows*, which appears as a note in the report of *The Normandy*. (2)

The whole matter has been argued and the cases considered in an American Court in a case of which a report is reprinted in *Lehigh and Wilkes-Barre Coal Co.* v. *Globe and Rutgers Fire Insurance Co.* (3) The authorities and text writers, English and American, are there considered, and it is a useful compendium on the matter. In the particular case a limited construction was put upon the word "collision." I make no comment upon that decision, except that it would be necessary to consider, before following it, what relation the clause which the Court was there construing—namely, the "towers" clause—bore physically and otherwise to the collision clause, which obviously occurred in the same policy, because it is cited in the judgment. It is certainly open to an argument—which was not noticed in the judgment—that the word "collision," being given a very much wider meaning by the terms of the collision clause, might be thought to have the same extension in the towers clause. That is a matter which the Court might have considered, but the position of the parties to the policy may have rendered the consideration of that matter superfluous. I merely mention that as being a matter which it would have been necessary for an English Court to consider, if it had been asked to approve that decision.

(1) 5 Asp. M. L. C. 447, 450.
(2) [1904] P. 187, 198.
(3) 26 Ll. L. Rep. 82; 6 Fed. Rep. (2nd ser.) 736.

That being one meaning which may attach to the word "collision" in some documents, it is quite obvious that the context in which the word occurs may make all the difference. It may be true to say that in some circumstances it *must* make all the difference. In Arnould on Marine Insurance, 11th ed., s. 826, the matter is put thus: "Sometimes, however, the clause is wider, so as to include the risk of striking against, not merely floating or navigable objects, but also structures such as harbours, wharves, piers, and the like, or obstructions such as ice or wreck." Instances of such wider clauses are cited in the note to that section and have been cited before me. One of them is *The Munroe*. (1) There the judgment was given by Gorell Barnes J. and the point was, whether the contact of a steamship, which was covered by a policy of insurance, with the wreck of a steamer, the ribs of which projected a foot above the sands, was a collision with a sunken wreck, within the meaning of the policy in question. That case does not throw much light upon the present case, except that it illustrates that there may be clauses of much wider ambit than those with which I have previously been dealing. The words were "through collision with any other ship or vessel, or ice, sunken or floating wreck, or other floating substance, or harbours, wharves, piers, stages and similar structures."

The next case that was cited was *Union Marine Insurance Co.* v. *Borwick*. (2) There are some words in the headnote of that case which, if they were warranted by the judgment, might be very helpful to the defendants in this case. In that case the vessel had been driven by wind and sea against a sloping bank. The insurance was "against risk or loss or damage through collision with any other ship or vessel or ice or sunken or floating wreck or any other floating substance, or harbours or wharves or piers or stages or similar structures."

The words in question in the headnote are that the loss was caused by collision, and not by stranding. I do not find those words "not by stranding" in the judgment. I do not find anything to show that the words "stranding" and

(1) [1893] P. 248. (2) [1895] 2 Q. B. 279.

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"collision" were regarded by the learned judge as mutually exclusive terms. He says in that case "I cannot distinguish collision with from striking against," and those words must be read in strict regard to the clause he was considering. He means that in some clauses and under some circumstances the collision may import the notion, as Barnes J. had said, of "striking against." In a clause such as this, where many of the objects mentioned are immobile objects, "striking against" does constitute a collision within the meaning of a clause such as there occurred.

Those are the cases cited to me in argument with which I find it necessary to deal. The case of *Chandler* v. *Blogg* (1) does not seem to me to call for any special comment.

The real question, in principle, is whether contact with ordinary natural objects constitutes collision or whether there must be contact with obstructions, that is to say, with some artificial object or with some natural object which is outside of its proper place. It is also argued—and this is the foundation of the argument for the defendants—that if one looks at the special arrangement of this policy and to the history of policies as gathered from reported cases, one sees that stranding is excluded from the cover granted by the policy and is never brought in again by the words of inclusion which afterwards occur; that upon the facts of this case this was a stranding; and that being the description into which the events in question truly fell, that this particular policy did not cover and protect the plaintiffs in the circumstances of this case.

I will deal with the stranding question first, before I pass to consider the argument as to what contact is included in the protection of the policy. Examining the structure of this policy, one sees that in the body of the policy occurs what is called the memorandum "free from all average of corn flour fish salt fruit" and "free from average on other matters under 5 per cent. and on all other goods the ship and freight under 3 per cent., unless general or the ship be stranded, sunk, or burnt." That is the memorandum. Then

(1) [1898] 1 Q. B. 32.

comes a clause which is in type, but which is pasted on the policy. That reads as follows: "Subject to the Institute, 'free of particular average absolutely' time clauses as annexed"—then follow the words "but this insurance to include damage received by the collision," etc. In this sentence there is no full stop after the words "Subject to the Institute, "free of particular average absolutely' ". The words "free of particular average absolutely" form a composite adjective qualifying "time clauses," and inasmuch as that incorporates the Institute time clauses as the "Institute time clauses free of particular average absolutely," one has to look at these. They are in print, pasted on to the policy, and they are headed "Institute time clauses hulls F. P. A. absolutely." Amongst the material clauses is clause 13, which begins as follows: "Warranted free from particular average absolutely"; then it goes on to deal with the question of the liability in general average, with certain provisos and provisions relating thereto. If the matter stopped there, it is quite certain that particular average damage, whether occasioned by stranding or by collision or anything else, is absolutely excluded. "Absolutely," to my mind, means "altogether"—"unconditionally." I do not agree with the argument that the exclusion which the persons who drew this policy had in mind under the word "absolutely" was merely an exclusion of particular average arising from special clauses, such as stranding, sinking, or burning. I think they had in mind the exclusion of all conditions, including the conditions dependent upon the extent or amount of the loss. It is an unconditional exclusion of all particular average. But that being so, there is the further provision constituting an inclusion of some particular average; and it is upon that inclusion that this case seems to me to turn. In other words, I think I cannot limit the force and effect of the including words by any supposed intention of the parties to exclude matters due to stranding or to sinking. If I were to do so, I should be speculating on their meaning, and I think I should be acting contrary to sound reason.

If stranding is to be excluded entirely from the words of

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the policy, owing to the presence of the word "absolutely," so by parity of reasoning ought "sinking" to be excluded. But I think it is quite clear that if "collision" is brought in by the subsequent clause, and then the vessel afterwards sank by reason of the collision, it would be improper to exclude the damage due to the sinking from the protection of the policy. Similarly if I take the view that the grounding was within the cover and protection of the policy owing to the collision clause, I ought so to hold, because what happened might also amount to stranding.

On the subject of stranding I would refer to *M'Dougle* v. *Royal Exchange Assurance* (1), in which Lord Ellenborough, in directing a jury very plainly and very usefully as to what they ought to find, said that stranding means lying on the shore, or something analogous to that: "To use a vulgar phrase which has been applied to this subject, if it is touch and go with the ship there is no stranding." That means that if there is a mere contact with the ground that does not constitute a stranding, there must be a remaining on the ground for a material time. My reason for mentioning that direction is that I must regard this case as inside or outside the policy, notwithstanding the fact that there was a stranding of considerable duration, just as much as I should regard it as inside or outside the policy if there were a contact with the rocks and the vessel sheared off them. In other words, I think the ultimate question in the case depends upon the test: Is contact with an ordinary natural feature a collision within the meaning of this policy or is it not? In my judgment it is, and my main reason for so holding is that the words are very general:—"collision with any object," and I think that by "any object" is meant any thing, and that then the drafters of the clause went on to include what is one natural object, namely ice, and to exclude another natural object, namely water. How far we have wandered to-day from the natural and limited meaning of the word "collision" is manifest when one talks about collision with water as a matter which is not included within the ambit of protection

(1) (1815) 4 Camp. 283.

of this policy. Collision with water could only be a contact with a heavy wave or with a tidal bore or something of that kind.

That being so, and the parties having given me a guide to their meaning by stating that contact with one natural feature, namely ice, is included, and that contact with another natural feature, namely water, is excluded, it seems to me that they have pointed the way to a conclusion which I believe is the right one: that in this policy contact with a natural object, namely with rocky ground, *is* included and covered by the policy.

For these reasons I give judgment for the plaintiffs for an amount to be determined. [This amount was then agreed at 106*l.*]

Judgment for plaintiffs.

Solicitors for plaintiffs: *Middleton, Lewis & Clarke.*
Solicitors for defendants: *Parker, Garrett & Co.*

F. P. F.

[IN THE COURT OF APPEAL.]

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KEPPEL *v.* WHEELER AND ANOTHER.

[1925. K. 611.]

Principal and Agent—Estate Agent—Agent to sell—Offer of Purchaser—Acceptance subject to Contract—Notice of Offer at higher Price—Duty to inform Principal—Breach of Duty—Measure of Damages—Commission.

Agents employed to sell land are generally employed to obtain the best purchase price reasonably obtainable. Their duty to their principal does not cease when they have procured an offer to purchase which he accepts subject to contract. It is still their duty to inform him of any offer which they receive at a higher price than that so accepted, and they remain subject to this duty until final contracts of sale and purchase have been signed and exchanged.

The owner of house property employed a firm of house agents to sell the property. They gave particulars to a tenant of the property, among other persons, and procured an offer from a prospective purchaser. They communicated this offer to the owner, and he

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accepted it subject to contract. The tenant then made an offer to the agents to purchase the property from the prospective purchaser at an increased price. In the bona fide belief that they had performed their duty as agents to the owner when he had accepted the offer of the prospective purchaser subject to contract, they omitted to inform the owner of the offer of the tenant. Afterwards final contracts for the sale and purchase of the property were signed and exchanged by and between the owner and the prospective purchaser. The owner then brought an action against the agents for damages for breach of duty in not disclosing to him the offer of the tenant before the contracts were signed and exchanged. The agents counterclaimed for commission on the sale of the property:—

Held, that the obligation of the agents to the owner was not fully performed when he had accepted the offer subject to contract but continued until final contracts were exchanged; that this obligation involved a duty to communicate to him the offer of the tenant; that having committed a breach of this duty they were liable in an action for damages, and that the measure of damages was the difference between the price named in the contracts and the price offered by the tenant.

Held also that in the circumstances the agents were entitled to their commission.

APPEAL from the judgment of Finlay J. in an action tried before the learned judge without a jury. The plaintiff, who was the owner of a block of flats at Walham Green, London, S.W., brought an action against the defendants, who were land and estate agents, for breach of their duty to him while they were acting as his agents. He alleged that on June 8, 1925, he through the agency of the defendants agreed to sell the block of flats to one Francis Essam for 6150*l.*; that before this date—namely, on June 3—the defendants had obtained from one Daniel an offer to buy the property for 6950*l.* and did not disclose this offer to the plaintiff, as it was their duty to do, but resold the property as agents of Essam to Daniel for 6950*l.*, whereby the plaintiff lost 800*l.*, the difference between 6150*l.* and 6950*l.*, and he claimed that sum with interest thereon from June 8, 1925, till payment or judgment. The defendants counterclaimed 149*l.* 15*s.* as their commission on 6150*l.*, that is to say 5 per cent. on the first 300*l.*, 2½ per cent. on the next 4700*l.*, and 1½ per cent. on the balance of 1150*l.*

The facts were as follows: On May 28, 1925, the plaintiff called on the defendants, who had acted for him and his

predecessor in title in collecting the rents of the flats, and told them that he wanted to sell the block of flats for 6500*l.*; but said he would probably accept 6000*l.* He also told them that he had also placed the property in the hands of Messrs. Giddy & Giddy, another firm of land and estate agents. On that and on the following day the defendants telephoned and wrote to a number of persons, among whom was one J. Daniel, who was one of the tenants of the flats. On May 29 Daniel asked for particulars, and the defendants informed him that they were instructed to sell the property and sent him an order to view. On the same day the following document was signed :—

"4 Harwood Road, The Broadway, Walham Green, S.W. 6. May 29, 1925. To Wheeler & Atkins—I am prepared to give the sum of 6150*l.* (six thousand one hundred and fifty pounds) for the freehold property Mitford Buildings and 2–14 Dawes Road, Fulham, as per attached particulars, subject to contract. Signed F. Essam, Arnewood, Melton Road, West Bridgeford, Nottingham."

F. Essam was in fact an estate agent carrying on business in London, but the address in Nottingham was the only address he gave to the defendants.

Mr. Atkins, a partner in the defendants' firm, took the above document to the plaintiff, who expressed satisfaction at the amount of the offer and at the defendants' promptitude in obtaining it, and said he accepted it subject to contract. Atkins telephoned to Essam that subject to contract the plaintiff accepted the offer, and Essam promised to send a deposit of 615*l.* and named as his solicitors Messrs. Fraser & Sons, 34 Park Street, Nottingham. On the same day the plaintiff wrote accepting Essam's offer in these terms: "May 29. Messrs. Wheeler & Atkins, 4 Harwood Road, Walham Green. Dear Sirs, Subject to contract I accept Mr. F. Essam's offer of 6150*l.* for the freehold property, Mitford Buildings and 2–14 Dawes Road, Fulham." . . . . On the same day Essam wrote enclosing a cheque and asking that a draft contract should be sent as soon as possible to his solicitors, Messrs. Fraser & Son; and the plaintiff wrote to

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his solicitor a letter containing the following statements: "Subject to contract my agents, Messrs. Wheeler & Atkins, have sold my buildings for 6150*l.* They will communicate with you upon the matter and will let you know who are the solicitors for the buyer, Mr. Essam."

On May 30 the defendant Atkins informed the plaintiff that he was sending copies of the offer and acceptance to the respective solicitors and that he had received a cheque for 615*l.*, which he was holding on trust until the sale was completed. The defendants wrote accepting, subject to contract, Essam's offer of 6150*l.* and acknowledging the receipt of 615*l.* as a deposit, and they also wrote to Mr. A. S. Legge, the plaintiff's solicitor: "Dear Sir, Mitford Buildings and 2–14 Dawes Road, Walham Green. Our client, the Honble. Arnold Keppel, has agreed, subject to contract, to sell the above freehold property to Mr. Francis Essam, of Arnewood, Melton Road, West Bridgeford, Nottingham. for 6150*l.* We enclose herewith copies of the offer and acceptance. . . . . Mr. Essam's solicitors are Mr. Fraser & Son, 34 Park Street, Nottingham, and he will be glad if you will forward them the draft contract as soon as possible." . . . .

On June 2 the defendant Atkins told J. Daniel by telephone that the property was "sold subject to contract." Daniel said he was sorry to hear it. On June 3, Daniel having made an offer for 6750*l.* for the property, Atkins asked Essam by telephone whether he would accept 600*l.* profit on his bargain. Essam declined, but said he was ready to accept 6950*l.* Daniel agreed to give this sum, and it was also agreed that the defendants should have a commission on the sale from Essam to Daniel of 115*l.*

On June 8 contracts of sale of the property by the plaintiff to Essam were signed, and on June 11 these contracts were exchanged. On June 20 a contract of sale of the property by Essam to Daniel was signed.

The learned judge held that all obligation on the part of the defendants to find or endeavour to find another purchaser ceased on May 30, when the plaintiff had accepted, subject to contract, the offer of Essam and allowed the defendants

to send the copy of his written acceptance to Essam's solicitors; that the defendants had then done what they had been employed to do and ceased to be agents of the plaintiff for the purpose of finding a purchaser, and that consequently the plaintiff was not entitled to succeed.

He therefore gave judgment for the defendants on the claim and counterclaim.

The plaintiff appealed.

van den Berg for the appellant. The learned judge was wrong in holding that no more is required of a land agent than that he should find a purchaser whom his principal, the vendor, is ready and willing to accept. If that were so a land agent having received offers from two prospective purchasers for different amounts might communicate the lower offer to his principal and conceal the higher one from him, and if his principal, being ignorant of the higher offer, should accept the lower, the agent would have performed his duty to the full and earned his commission, and would then be at liberty to bring about a second contract of sale between the purchaser and the person who was willing to purchase at the higher figure. This is a mistaken view of the obligation of a land agent. His duty is not performed when he has found a purchaser at the lowest price which his principal will accept, but when he has found a purchaser at as high a price as can fairly be obtained: Story on Agency, s. 210, 9th ed. (1882), p. 240. Moreover this duty remains incumbent upon him until the contracts of sale and purchase have been exchanged between the parties to the contract of sale. At the trial the respondents insisted that when Essam's offer had been accepted by the plaintiff "subject to contract," the property had been "taken out of the market," that they had "produced a purchaser," and that the appellant could only succeed in the action by repudiating "his bargain with Essam." But this again is a mistake. An acceptance "subject to contract" does not conclude a contract, but leaves the parties still in the stage of negotiation. "If you find, not

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an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract": *Rossiter* v. *Miller*, per Lord Cairns L.C. (1). *Coope* v. *Ridout* (2) and *Chillingworth* v. *Esche* (3) are to the same effect. It is clear that up to June 8 at all events, if not up to June 11, the appellant might himself have found a purchaser at a price higher than that offered by Essam: *Brinson* v. *Davies*. (4) The measure of damages for this breach of duty is the difference between 6950*l*., the amount of Daniel's offer, and 6150*l*., the amount of the purchase money paid by Essam; that is to say, 800*l*.

With regard to the counterclaim by the respondent for commission, it is the duty of an agent to make a full disclosure of any interest he may have in a purchase effected by himself: *Dunne* v. *English*. (5) The principle of that case governs this. Not having disclosed the offer of Daniel the respondent is disentitled to any commission: *Salomons* v. *Pender* (6); *Andrews* v. *Ramsay & Co.* (7)

[*Barker* v. *Harrison* (8) was also cited.]

Hawke K.C. and *Bowstead* for the respondents. It makes a great difference in cases of this class whether the agent has been guilty of fraud or whether he has acted honestly and innocently. In the present case the respondent Atkins obtained an offer from Essam; he had no knowledge that Essam was an agent proposing to sell at a profit. He communicated this offer to the appellant, and the appellant accepted the offer readily. The learned judge has found that the respondent Atkins acted in good faith throughout. In these circumstances the respondent was no longer agent for the sale of this property. He had done his work. "Those who bargain to receive commission for introductions

(1) (1878) 3 App. Cas. 1124, 1139.
(2) [1921] 1 Ch. 291.
(3) [1924] 1 Ch. 97.
(4) (1911) 27 Times L. R. 442.
(5) (1874) L. R. 18 Eq. 524.
(6) (1865) 3 H. & C. 639.
(7) [1903] 2 K. B. 635.
(8) (1846) 2 Coll. 546.

have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced": *Fisher* v. *Drewett* (1), per Bramwell L.J. The agent's work is done when he has found a party "able and willing" to enter into the contract which the agent is employed to effect: *Green* v. *Lucas* (2); *Nosotti* v. *Auerbach*. (3) Having done this he is no longer under a duty to make further efforts to obtain a purchaser.

[BANKES L.J. He is bound to communicate offers more favourable than those he has already received.

ATKIN L.J. referred to *Toulmin* v. *Millar*. (4)]

van den Berg in reply.

BANKES L.J. I wish to make it quite plain that in my opinion this case must be decided upon the footing that the respondents, the house agents, were acting in good faith in this matter, but under a misapprehension as to their legal position in reference to their client.

The material facts are these: Mr. Keppel, the appellant, was the owner of some house property. The respondents had been employed by him to collect the rents and look after the property, and in that way he was known to them, but the fact that they had been so employed is immaterial for the present purpose. He was anxious to sell the property, and he got into communication with the respondents in reference to that matter. They had some time before valued the property at 7000*l*., but the appellant, apparently, was anxious to sell the property. When he gave them instructions to try and find a purchaser, he named the price of 6500*l*. which they were to ask, but he intimated that he would be prepared to consider favourably an offer of 6000*l*. Those instructions were given on May 28, 1925. The respondents straightway put themselves into communication with a number of persons who were on their books, dealers in property, estate agents, and persons who they thought

(1) (1878) 48 L. J. (Ex.) 32.
(2) (1875) 33 L. T. 584.
(3) (1898) 79 L. T. 413.
(4) (1887) 58 L. T. 96.

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might be interested in this property. They at once got into touch with a Mr. Essam, who on the very next day, May 29, made an offer of 6150*l.* As soon as he made the offer, Mr. Atkins, a member of the respondents' firm, went to see the appellant and communicated the offer to him; and the appellant expressed himself highly gratified at so quickly receiving an offer at that figure; he instructed Mr. Atkins to accept the offer subject to contract, and wrote a formal letter authorizing him to accept Mr. Essam's offer subject to contract.

I pause here to state plainly what is now well established, that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged; so that although those instructions were given by the appellant to the respondent Atkins, the matter remained in negotiation in the eye of the law until June 11, that being the date on which the contracts were exchanged, though they were apparently signed on June 8. So between May 29, when the authority was given to close with Mr. Essam's offer subject to contract, and June 11 or possibly June 12, the matter, as between the plaintiff and Mr. Essam, remained in negotiation.

One of the persons to whom Mr. Atkins, as representing the plaintiff, had sent particulars of this property was a Mr. Daniel. Mr. Daniel happened to be away from home at the time. When he returned home, on June 2, he found the particulars which Mr. Atkins had sent to him. He got into communication with Mr. Atkins, and then found out that the property was sold subject to contract. There is a copy of a telephone message from Mr. Atkins to Mr. Daniel, dated June 2, at 2 P.M., which says: "Said he had considered matter and seen his solicitors. Told it was sold subject to contract. He is sorry. Said it went on Friday."

Mr. Daniel was not deterred by the news that the property had been sold subject to contract. He went to see Mr. Atkins. There is an extract from Mr. Atkins' diary of June 3 which shows exactly what happened: "Mr. J. Daniel called. Will

purchaser take a profit on his deal. He made an offer of 6750*l.*"

Now, when Mr. Daniel made that offer, Mr. Atkins, as I think, made the unfortunate mistake of communicating to Mr. Essam, but not to Mr. Keppel, the fact that Mr. Daniel was prepared to give a larger sum than Mr. Essam. The communication with Mr. Essam appears in a note of a telephone message from Mr. Atkins to Mr. Essam on June 3 at 3.50 P.M., which is: "Asked if he would accept 600*l.* profit on his deal—namely 6750*l.*"—that is to say, he was passing on to Mr. Essam Mr. Daniel's offer—"Said I had offer of that amount. How much would our commission be. 150*l.* about would be scale but if he would accept offer we would take 100*l.* Has to give Bickford something so cannot accept. Lowest 7250*l.* Suggested he should make it 7000*l.* to which he eventually agreed. Commission 120*l.*"

The matter went on, and a contract was exchanged between Mr. Essam and Mr. Daniel at a price of 6950*l.*, and then the matter got to the appellant's ears. A good deal of trouble ensued, and ultimately this action was brought. The action was brought by the appellant against the respondents for breach of their duty as agents in not disclosing to him this offer which they had received from Mr. Daniel. The respondents retaliated by saying that they were under no duty to him in reference to the matter at all, and they counter-claimed for their commission.

So far as the claim is concerned, the question turns entirely upon what the respondents' position was in reference to the appellant during the interval between May 29 and June 11. They do not dispute that they were employed as his agents to dispose of the property; or that so long as they continued his agents they were under an obligation to make to him all proper disclosures; or that if, while still his agents, they had received this offer from Mr. Daniel of a larger sum than Mr. Essam had offered, they were under a duty to disclose that fact. But their position has been throughout that, as soon as they had introduced Mr. Essam, who was a willing purchaser, and the appellant had accepted his offer, although

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it was an acceptance subject to contract, they had completed their obligation as agents, and had earned their commission, and were free to act as independent persons whose agency, so far as the appellant was concerned, had terminated.

The question is, What in these circumstances was the position in law of the respondents? I am satisfied after the very full discussion which has taken place that at any rate their duty as agents did not terminate until the contracts were exchanged between the plaintiff and Mr. Essam. I do not mean that they were bound to look out for other purchasers; but I do mean that so long as they continued agents, it was their duty to communicate any offer which came to them larger or more satisfactory than the one which they had already submitted to their principal. I think that duty is plain, where, as here, the information comes as a result of submitting particulars which they had submitted in the first instance to Mr. Daniel as agents for the appellant.

In these circumstances, I am not going to discuss all the matters which have been debated in testing this question whether the agency had or had not determined, because it seems to me that an agent may well say: "I have done everything which, assuming that the matter went through, would entitle me to receive my commission," and yet remain under the obligation of an agent to disclose such matters as the particular offer in this case.

As indicating that this is the correct view of the situation I will give three instances of what might have occurred during the interval between May 29 and June 12. Of course Mr. Essam might have changed his mind; the matter was only in negotiation. If he had done so it could not be said that the respondents were entitled to their commission upon the ground that they had done all they were bound to do, and had earned their commission as soon as the appellant accepted the offer subject to contract. Again, these respondents were not employed as exclusive agents; if the appellant had found a purchaser during this period who was prepared to give more, or who for some reason was a more desirable purchaser, he would have been entitled to sell the property to that

person, and the respondents would have had no cause of complaint. Or again, if the other agents had found during this interval a person whom the appellant preferred, or who would give a larger amount, the appellant would have been entitled to accept that person, and the respondents would have had no cause of complaint. Those are three good tests of the position as between these parties, indicating that it is not true to say that the relationship between the parties ceased on May 29, and that on that date the respondents were entitled to their commission and were entitled to say that they were free for all purposes from any duty as agents for the appellant.

I think, therefore, that these gentlemen, the respondents, misunderstood their position; and that they and other agents must understand that in the circumstances existing in this case, they are not free from the responsibility of agents merely because their client is prepared to accept an offer subject to contract, and that their responsibility continues until formal contracts are approved and exchanged.

The amount of damages is the difference between the amount which Mr. Essam in fact gave, and the amount which Mr. Daniel would have given if the respondents had done what it was their duty to do, and had communicated to the appellant the fact that he was a willing purchaser. It may be, as Mr. Bowstead suggested, that if the respondents had done what they ought to have done, Mr. Daniel would have got this property for less than he in fact gave for it, and the appellant would have got not very much more than he in fact got. But it does not do to guess in these matters, and I do not think that the respondents, who have committed a breach of their duty, are entitled to take up the position of saying: "If we had done our duty, Mr. Daniel would not have offered as much, and Mr. Keppel would have got less." I think, as the parties have left the matter of the damages to us, we are not guessing, but we are taking a fair estimate of the position when we say that Mr. Daniel's offer of 6750*l.*, which he was prepared to give, was one which the appellant would have accepted, and that the measure of damages is the difference

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between the 6150*l.* and the 6750*l.*, that is 600*l.*; but the appellant could not have obtained that sum without paying commission upon it at 1½ per cent. That leaves the damages at 591*l.* The appellant contended that the agents have disentitled themselves to recover the commission, but I do not take that view at all. It seems to me that an agent might quite properly claim his commission, and yet have to pay damages for committing a bona fide mistake which amounts to a breach of duty. In these circumstances, I think the respondents are entitled to the claim which they make for commission. The appeal therefore will be allowed, and judgment entered for the appellant for 591*l.* with costs, and for the respondents for the amount that they claim, with costs; and the plaintiff must have the costs of the appeal.

ATKIN L.J. I agree. It is plain from the facts of this case that the appellant was prepared to sell this block of flats in Walham Green for 6150*l.*, a price which appeared highly attractive to anybody who was in the market for that class of property at that time.

The respondents were estate agents, who had managed the flats for the appellant. He had put the flats in the hands of well known agents, who for two or three weeks had failed to dispose of them. He then employed the respondents to sell the flats, and within twenty-four hours the respondent Atkins had obtained a purchaser who was prepared to buy the flats at a price which the appellant was prepared to accept. The purchaser was introduced to Mr. Atkins by a Mr. Bickford, of whom we know nothing except that he is said to be an investor in this class of property, and he eventually got something out of the profit which Mr. Essam, that is the purchaser who was introduced, made on the transaction.

Mr. Essam was in fact another estate agent in London, but apparently he concealed this fact from Mr. Atkins, to whom he only gave an address in Nottingham. Mr. Atkins put his offer forward, having got it reduced to writing, and presented it to his principal, the appellant; and the appellant

accepted the offer subject to contract, and signed a letter addressed to the respondents in those terms.

The result of that was that the matter still remained in negotiation; that the appellant had intimated that he was prepared to carry on the negotiations upon the footing of that price being agreeable to him, and that the negotiations were to be continued after that stage, not by his agents but by his solicitors.

Now I am not surprised that a great deal was made of this transaction with Mr. Essam, and of the fact that his London address and his occupation were not disclosed to the appellant; but after hearing the witnesses, the judge decided that the matter went through in good faith on the part of Mr. Atkins, and I am not prepared to dissent from that decision. The real bearing of the transaction is that it clearly excited suspicion in the minds of the appellant and his advisers when they knew of it, and that indicates that he would very likely have withdrawn from the negotiations with Mr. Essam if in fact he had discovered what the true facts were. That is the real bearing of these facts upon the matter which we have to discuss.

This matter went through in the way that I have described on the Friday before the Whitsuntide holiday, and on Whit Tuesday a Mr. Daniel, who it appears was a tenant of the flats, and had been in communication with Mr. Atkins and had been given particulars and an order to view, rang up early in the morning and said that he had been considering this matter; and he was then, apparently, told that the property had been sold. Mr. Atkins' diary says that he told him it had been sold, and an entry of a telephone message says that it had been sold subject to contract. Mr. Daniel, who obviously wanted the flats, then asked whether the purchaser would take a profit upon his deal, and eventually he was told that he must make a large offer, at least 600*l.* more than the gentleman had given in fact, and eventually Mr. Daniel was induced to offer 6950*l.*, which he did on Tuesday, June 2.

Now the matter was still in negotiation, as I have said,

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because there was no concluded contract between Mr. Essam and the appellant until June 8 or 11; it does not matter which, it was the next week at any rate. It appears to me that in those circumstances the agents having obtained that further offer were under an obligation to disclose it to their principal, the appellant. They had got it from a person to whom they had communicated the particulars on behalf of the appellant, and from a person who had approached them on the Tuesday originally as being the agents of the appellant; and they were consequently under a plain duty to disclose this offer of a better price to their principal, unless the employment had come to an end and they were under no contractual obligation to him at all.

That is the question which we have to discuss. Were they at that time under any contractual obligation to the appellant? It appears to me to be a complete mistake to suppose that when agents are employed to sell a property, their duty ends when they have introduced a purchaser ready and willing to buy the property. It is true that if the transaction goes through, that is all they need prove in order to earn their commission; but up to the time at which there is in fact a concluded agreement between the purchaser and the vendor, the agents still have a duty to their principal. For instance, supposing after they had introduced a purchaser ready and willing to purchase, but, the matter still being in negotiation, they discovered that the person so introduced was either a person who was insolvent, or a person of bad character, or a person who intended to employ the premises for some purpose contrary to law, or perhaps contrary to the conditions in the vendor's agreement, then it appears to me to be plain that it would be their duty to their principal to disclose those facts to him. On the other hand, supposing that the purchaser, while still in negotiation, applied to the agents for further particulars of the property in order to complete the negotiations, which particulars had been entrusted to the agents by the vendor for the purpose of imparting to prospective purchasers, then in my opinion they would be committing a breach of their duty to their principal the vendor if they

declined to give those particulars, on the ground that they owed no further duty to anybody in the matter. And, if the proposed sale went off because of that refusal, the principal, the vendor, might have a substantial cause of complaint against the agents; he would have a claim for breach of the contract to use reasonable skill and diligence in the obtaining of a purchaser, a person who would purchase the property. For those reasons it appears to me to be a mistake to suppose that the contractual relationship ends as soon as a person has been introduced who is in fact ready and willing to purchase. It continues as long as the negotiations between him and the vendor continue. To my mind that is made plain by the words of Lord Watson in *Toulmin* v. *Millar* (1), which, though obiter dicta, are of great weight. I think, therefore, that there was a breach of contract.

Now, has it caused damage? Mr. Daniel was a purchaser of this property at a sum which eventually turned out to be 6950*l*. It is true that he began by a lower offer, and it may very well be that if his offer had been disclosed to the appellant, he might have got the property at a smaller sum. I am not satisfied that the largest sum would necessarily have been obtained, but I think it is right to fix the sum which Mr. Daniel offered without any demur, namely, 6750*l*., as being the sum which would have been obtained.

I do not agree with Mr. Hawke that the appellant fails to prove his damages because he was not called. I think the proper inference from the facts is that he would have been prepared to entertain the further offer, and would not have considered himself bound by the negotiations which had begun, even though he had put his signature to a document that he was prepared to accept the offer subject to contract. At any rate, if the respondents intended to show that the appellant would not have taken the higher price, the burden of proving it lay on them and they obviously failed to prove it. Therefore it appears to me that the damages should be as has been stated.

The other question is whether the respondents should succeed

(1) 58 L. T. 96.

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on their counterclaim. Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith, and as the transaction was completed and the appellant has had the benefit of it, he must pay the commission. Therefore, I think, the defendants are entitled to recover on their counterclaim.

The result is that I think that the appeal must be allowed with costs, and that the judgment should be varied by entering judgment for the plaintiff for 591*l.*, but the judgment on the counterclaim must stand.

SARGANT L.J. I am of the same opinion, and will add very little. In my view, counsel for the respondents were seeking unduly to limit the responsibility of the estate agents, in respect both of its extent and of its duration. As regards extent, the argument at one time seemed to suggest that the agents were merely agents for the purpose of obtaining a purchaser. That is not so. They were agents for the purpose of obtaining the best purchase price which could reasonably be obtained, and it is quite clear that if the offer of Mr. Daniel had come before the making of the quasi contract with Mr. Essam, it would have been a gross dereliction of duty if the agents had not informed the principal of the receipt of that larger offer.

With regard to the duration of their responsibility, I think that the agents here have not fully apprehended what is now a definite rule of the Court, that an agreement subject to contract is merely in the stage of negotiation. That has been said over and over again since Sir George Jessel enunciated it in *Winn* v. *Bull* (1), and it has been definitely laid down in this Court two years ago, in the case of *Chillingworth* v. *Esche.* (2)

(1) (1877) 7 Ch. D. 29. (2) [1924] 1 Ch. 97.

There it was held that when upon such an imperfect contract a so-called deposit was paid, that deposit was not really in the nature of a deposit at all, but remained the property of the person paying it, and had only been really intended to form a deposit in the true sense in case it should happen that there was ultimately a formal and definite contract entered into. The agents here seem to have thought, and I think persons who are wholly or partly laymen might well think, that some definite change took place in the relationship between them and the vendor as soon as this contract had been made subject to contract; and if that particular form of words had not been used, but it had otherwise been clear that the matter had not got beyond the stage of negotiation, I doubt very much whether they would have attempted to draw this hard and fast line setting a limit to their duty on the date in question. To my mind it is quite clear as regards time, that when agents are employed to find a purchaser for a property, their position as agents cannot definitely end at any time short (at the earliest) of the time when a definite binding contract is entered into and exchanged: and that if in the interval they receive information—whether, as in this case, from some one with whom they had originally communicated on behalf of their principal, or from some outside source, which tends to show that the value of the property was greater than had been supposed, or is otherwise of a nature to influence materially the judgment of their principal in going on with, or ceasing to go on with, the contract which was being originally negotiated, they are bound to communicate that information to their principal; and if they do not do so, they are guilty of a breach of their duty as agents. If the respondents had heard, two days after the formation of this agreement subject to contract, that the property had been scheduled to be taken for the purposes of a public improvement, or that some other event had happened, quite disconnected with the agency, which necessarily increased the amount which the vendor might expect to obtain, then it seems to me that they would be definitely bound, in their capacity of agents for sale for this vendor,

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to communicate that information to him. That being so, it follows that in my judgment the appellant is entitled to succeed upon the claim. On the other part of the case, I have nothing to add to what has fallen from the other members of the Court.

BANKES L.J. The appeal will be allowed, and judgment will be entered for the appellant for 591*l.* with costs here and below. The judgment for the respondents on the counterclaim will stand.

Judgment accordingly.

Solicitors for appellant: *Fowler, Legg & Young.*
Solicitors for respondents: *Williams & Poole.*

W. H. G.

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Nov. 18, 19; *Dec.* 20.

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INLAND REVENUE COMMISSIONERS *v.* EARL OF LONGFORD.

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Revenue—Super Tax—Assessment—On Trustees of Settlement—On Guardian of Infant—On Infant—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *ss.* 4, 5, 7, *General Rules applicable to All Schedules, r.* 4.

Where property is held by trustees under a settlement or will in trust for an infant so that the whole of the income of the property, or the residue of the income after the application of part thereof for the infant's maintenance, education or benefit, is to be accumulated, the infant is liable to be assessed to super tax in respect of the whole of the income arising from the trust property.

In such a case assessments to super tax cannot be made under s. 7, sub-s. 6, of the Income Tax Act, 1918, and r. 4 of the General Rules

applicable to All Schedules, upon the trustees or upon the guardian of the infant in a representative capacity in respect of the total income of the infant.

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CASE stated under the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, the Taxes Management Act, 1880, s. 59, and the Income Tax Act, 1918, s. 7, sub-s. 6, and s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners held on May 27, 1921, for the purpose of hearing appeals The Hon. G. M. Pakenham, G. F. Stewart and H. N. Walford (hereinafter called "the respondents"), appealed against assessments to super tax made upon them as trustees of the Right Hon. the Earl of Longford (a minor) for the years specified under the provisions relating to super tax.

	In the amount of
For the year ended April 5, 1918 . .	16,000*l.*
,, ,, ,, April 5, 1919 . .	16,500*l.*
,, ,, ,, April 5, 1920 . .	26,000*l.*

2. The said Right Hon. the Earl of Longford (hereinafter called "the Earl") was the sixth Earl and was at the time of the hearing of the appeal an infant, having been born on December 29, 1902. The Countess of Longford, his mother, was during his infancy his guardian.

3. By a settlement made on August 22, 1899, the Right Hon. Thomas fifth Earl of Longford, father of the Earl, conveyed certain real estates in Ireland to trustees upon trusts under which upon his own death, which occurred on August 21, 1915, his son (the Earl) became tenant in tail male. The said settlement contained no express power of management during minority nor did it contain any direction that the statutory provisions were not to be applied. The trustees thereof were by the said settlement appointed trustees for the purposes of s. 42 of the Conveyancing Act,

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1881. At the time of the late Earl's death the property settled consisted, and it had since that date consisted, partly of realty and partly of personalty which represented the investment of proceeds of sales of realty. The trustees of this settlement were the persons named in the assessments appealed against.

4. By a settlement dated November 8, 1862, certain property referred to as the Bedfordshire Estates was settled by the grandmother of the Earl, the Hon. Selina Rice Trevor, upon her marriage with the fourth Earl of Longford. By this settlement the estates were limited (subject to a term for raising pin money during the joint lives of the spouses) to the use of the then Earl for life, with remainder to the use of the said Selina Rice Trevor for life, with remainder to the use of the first son of the marriage in tail male, with divers remainders over as therein provided. The settlement contained a clause directing the trustees to enter and receive and apply the rents and profits during minority and the trustees were given powers of management and subject thereto were to apply such sums as they should think fit to the maintenance of the infant and to accumulate the surplus, such provisions being limited to the minority of any son of the intended or any future marriage of the said Selina Rice Trevor. The trusts of the accumulations were if the son should attain twenty-one or die under that age leaving inheritable issue for the son; but if he should die under twenty-one without such issue then upon trusts as capital money. It was also provided that the provisions of the minority clause (originally made applicable only to the minority of a son of the said Selina Rice Trevor) should apply, so far as they were or could be made applicable, to the minority of any person who would for the time being be entitled under the settlement to the rents and profits. In the events which happened the Earl, upon the death of his grandmother the said Selina Dowager Countess of Longford on January 22, 1918, became tenant in tail of these estates.

The trustees of this settlement were not the same persons as the trustees of the settlement of August 22, 1899.

5. After the Earl became entitled to the estates the subject of the settlement dated August 22, 1899, the trustees of that settlement paid yearly during his minority a sum of 2500*l.* for his maintenance, and after the Earl became entitled to the estates the subject of the settlement dated November 8, 1862, the trustees of that settlement paid yearly during his minority a sum of 500*l.* for his maintenance. The balance of income arising from both estates had been accumulated.

6. During the year 1919 correspondence arose between the Special Commissioners of Income Tax and the guardian of the Earl with regard to the super tax liability of the income of the Earl, and the Countess of Longford having been called upon as guardian of the Earl to make a return for the year ended April 5, 1917, and having failed to do so, an estimated assessment to super tax was made on her by the Special Commissioners for that year with the intention of bringing into assessment the total income of the previous year of the Earl from all sources, including the whole income arising from the estates the subject of the said settlement of August 22, 1899, but not the income arising from the estates the subject of the settlement of November 8, 1862, the Earl not having become entitled to such estates until January 22, 1918.

7. At a later date in consequence of the said correspondence the Special Commissioners served notices to make returns of the total income of the Earl from all sources for super tax purposes for the years ended April 5, 1918, April 5, 1919, and April 5, 1920, on the respondents. These returns were in due course made by H. N. Walford on behalf of himself and co-trustees. In such returns of the Earl's total income there was included as the income of the Earl arising from both the said two settled estates each year only the sums paid by the respective trustees of both settlements for maintenance in the respective previous years. The above assessments to super tax, the subject of the present case, were subsequently made on the respondents as trustees of the Earl for the years ended April 5, 1918, April 5, 1919, and April 5, 1920,

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with the intention of including therein each year the total income of the Earl from all sources for the respective previous years including the whole income arising from both estates, whether used for maintenance or accumulated, but only as regards the income from the estates the subject of the settlement of November 8, 1862, from the time at which the Earl succeeded thereto.

9. At the hearing of the appeal, which was heard together with an appeal by the Countess of Longford against the said super tax assessment for the year ended April 5, 1917, mentioned in para. 6 hereof, counsel on behalf of the respondents referred to the correspondence which had passed relative to making the assessments, and contended that it was open to him to object in toto to assessments being made upon the trustees of the settlement of August 22, 1899.

In the alternative he contended :—

(*a*) That the Countess of Longford was not liable to any assessments as guardian for any year ;

(*b*) That by virtue of s. 43 of the Conveyancing Act, 1881, the Earl was not entitled under the settlement of August 22, 1899, to receive more than the sums allowed to him for maintenance under that settlement, and that by the provisions above referred to of the settlement of November 8, 1862, he was assessable on the same principle as regards the income of that settlement.

(*c*) That the trustees of neither settlement were (apart from any submission which they might be deemed to have made in the correspondence above referred to) under any obligation to make any super tax returns on behalf of the appellant.

10. On behalf of the Commissioners of Inland Revenue it was contended (inter alia) :—

(*a*) That the respondents were liable to be assessed to super tax in respect of the total income from all sources of the Earl.

(*b*) That such total income included for the purposes of super tax for each of the three years ended

April 5, 1920, the whole income arising during the respective previous years (1.) from the estates the subject of the settlement of August 22, 1899, and (2.) from the estates the subject of the settlement of November 8, 1862, from the date at which the Earl succeeded to such latter estates.

(*c*) That the trustees were liable to make super tax returns of the income of the Earl.

(*d*) That the assessments were in principle correctly made and should be confirmed subject to any necessary adjustment of figures.

11. The Special Commissioners who heard the appeal gave their decision in this and the appeal referred to in para. 9 hereof together as follows :—

"We have read the correspondence relative to the making of the assessments for the years subsequent to the year 1916–17 and we have formed the view that the trustees are debarred from objecting to the form of the assessments, so far and so far only as the minor is liable either through his trustees or his guardian to assessment to super tax.

"As regards the liability through the guardian, who is herself assessed for the year 1916–17, we hold that it is restricted to so much of the income of the minor as passes through her hands. The authority for assessing her in respect of his income is contained we think in the case of *Drummond* v. *Collins* (1), notwithstanding that she has not the 'direction, control or management' of the property from which the income issues. Upon the amount allowed or expended for the maintenance of the minor in the year 1915–16 being stated, we are prepared to adjust the assessment for 1916–17 accordingly. For years subsequent to 1916–17 for which the trustees are assessed they are liable in our opinion as already stated to the same extent at any rate as the guardian is or would be liable, but we have to decide the further question whether the balance of the income of the estates which is being accumulated should be assessed

(1) [1915] A. C. 1011 ; 6 Tax Cas. 525.

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for these years. Three points are contended for on behalf of the minor :—

"(1.) that neither guardian nor trustees are under any obligation to make a return of the balance of income in question and that the Special Commissioners have no power to make an assessment except upon a return, or upon a failure to make a return, which has been legally demanded, from a person who is liable to make it.

"(2.) that the balance of income in question is not receivable by the minor within the meaning of the Finance (1909–10) Act, 1910, s. 66, sub-s. 2 (*d*), and

"(3.) that the income from the estates so far as it is being accumulated is not vested income of the minor.

"We have not found it necessary to make up our minds as to the effect of the deeds on the last point and we only think it right to observe about it that our decision will leave it open to the assessing Commissioners to make an assessment upon the Earl upon the whole of the accumulation as soon as he comes of age.

"As regards the first of the two other points we have already given our opinion upon the liability of the guardian. Dealing with the trustees, who have the control and management of the property, the question to be decided is whether they can be charged with sufficient knowledge enabling them to make a return. Were it not for the definite decision which we have arrived at on the second point we might have had some doubt as to what we ought to decide on this point owing to various remarks made by the judges in the case of *Brooke* v. *Inland Revenue Commissioners* (1) to the effect that a trustee might be required to make a partial super tax return. These dicta in their entirety do not seem to us in themselves a necessary part of the judgment of which they form part, though it was necessary for the purpose of those judgments to give some meaning to the words of the Super Tax Act relating to returns by the incapacitated and non-resident

(1) [1918] 1 K. B. 257 ; 7 Tax Cas. 261.

persons. Such a meaning in the case of the present minor is found in the liability of the guardian to be assessed for the maintenance money. The return prescribed for the purpose of super tax is, however, a return of the total income and we do not, therefore, see (apart from the authority of the dicta referred to), especially as regards to the year in which the minor has an interest in two estates, how the assessing Commissioners can require returns in this form from either body of trustees. It seems to us, with due respect to those remarks, that the trustees' duties begin and end with the administration of the estate, and that since the liability of the minor to super tax does not depend on the estates but upon his total income from the estates and all other sources the trustees are not liable to make the returns nor do we see how, if they must make the partial return referred to, there is authority to make assessments upon them.

"As regards the second point, inconvenient as it will undoubtedly prove, we are bound, we think, to decide that income of a minor which is being accumulated by trustees is not receivable by the minor. The history of the provisions relating to such accumulation whether under express deed or implied by statute is a long one, but it is governed throughout by the one dominating consideration that the minor is not for the time being to be allowed to receive the money, and we cannot, therefore, in our opinion say that it is liable to present assessment to super tax."

The Special Commissioners accordingly, there being consent between the parties to the appeal as to the amount of income to be returned under their decision, discharged the assessment for the year ending April 5, 1917, and reduced the remaining assessments as follows:—

For the year ending April 5, 1918, to 3333*l.*
" " " April 5, 1919, to 3333*l.*
" " " April 5, 1920, to 4285*l.*

12. Immediately upon the determination of the appeal the Commissioners of Inland Revenue expressed their dissatisfaction with the determination of the Special Commissioners as being erroneous in point of law and in due course

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required the Special Commissioners to state and sign a case for the opinion of the High Court pursuant to the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, the Taxes Management Act, 1880, s. 59, and the Income Tax Act, 1918, s. 7, sub-s. 6, and s. 149, which case the Special Commissioners stated and signed accordingly.

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Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on May 27, 1921, for the purpose of hearing appeals the Countess of Longford appealed against an assessment to super tax made upon her as guardian of her son, the Right Hon. the Earl of Longford (a minor), for the year ended April 5, 1917, in the sum of 12,000*l.* under the provisions relating to super tax.

This appeal was heard together with the appeals by the Hon. G. M. Pakenham, G. F. Stewart, and H. N. Walford against assessments to super tax made upon them as trustees of the Earl for the three years ended April 5, 1920, and the facts and contentions in this appeal were substantially the same as in that appeal and are therefore not set out separately.

The decision of the Commissioners in this case was given together with their decision in the appeal of the trustees, and is set out in that case.

The Commissioners accordingly, there being consent between the parties to the appeal as to the amount of income to be returned under their decision, discharged the assessment for the year ending April 5, 1917, the total income of the Earl from all sources for the year ended April 5, 1916, on the basis of the Commissioners' decision being below the total income upon which super tax was payable for the year ended April 5, 1917.

The Inland Revenue Commissioners being dissatisfied with the decision of the Special Commissioners required them to state a case for the opinion of the High Court.

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INLAND REVENUE COMMISSIONERS *v.* THE HON. G. M. PAKENHAM.

SAME *v.* LONGFORD (COUNTESS).

SAME *v.* LONGFORD (EARL).

GASCOIGNE *v.* INLAND REVENUE COMMISSIONERS.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners held on February 22, 1924, for the purpose of hearing appeals, the Right Hon. the Earl of Longford, a minor, of North Aston Hall, Deddington, Oxfordshire, hereinafter called "the minor," appealed against an assessment to super tax made upon him in the estimated sum of 26,000*l.* for the year ended April 5, 1921, under the provisions of the Acts relating to super tax.

2. The facts relating to the income and property of the minor were as set out in a case stated upon an appeal against assessments for the three previous years, and set out above.

3. For the year ended April 5, 1921, the Countess of Longford had been assessed to super tax as guardian of the minor in the sum of 4642*l.* It was admitted on behalf of the minor that this assessment was correct, and that it represented the amount received by the Countess in the previous year for the maintenance of the minor from the trustees of the settlements of November 8, 1862, and August 22, 1899. Income tax had been added to the amount so received in computing the assessment.

4. A notice to make a return of total income from all sources for the purposes of super tax for the year ended April 5, 1921, was sent to the minor at North Aston Hall on August 3, 1922. No return having been made the said assessment of 26,000*l.*, which was under appeal in this case, was made by the Special Commissioners upon the minor on September 11, 1923.

5. At the hearing of the appeal it was stated on behalf of the Inland Revenue Commissioners that under no circumstances would duty be collected under the two assessments in excess of the amount payable in respect of the total income of the minor under such assessment or assessments as should be correct in form.

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6. The minor attained the age of twenty-one years on December 23, 1923.

7. At the hearing of the appeal it was contended on behalf of the minor :—

(1.) That the Commissioners should follow their decision for the earlier years and discharge this assessment ;

(2.) That this assessment was a double assessment with the assessment on the Countess for the same year ;

(3.) That the minor had no control over the income sought to be assessed so as to be able to make a return ;

(4.) That the minor was not in receipt or control of the income which was being accumulated by the trustees ; and

(5.) That the assessment should be discharged.

8. On behalf of the Inland Revenue Commissioners it was contended (inter alia) :—

(1.) That the minor could be called on to make a return for the purposes of super tax.

(2.) That the minor was assessable to super tax.

(3.) That the total income of the minor included for the year ended April 5, 1921, the whole income arising during the year ended April 5, 1920, from the respective estates the subject of both the settlements of November 8, 1862, and August 22, 1899.

(4.) That the assessment was not a double assessment and was not intended to create any liability to the extent to which it overlapped the assessment on the guardian.

(5.) That the assessment was correct in principle and should (subject to any necessary adjustment of figures) be confirmed.

The Commissioners who heard the appeal decided that the minor was not the person in receipt of the income, which was being accumulated by the trustees, so as to be liable to super tax thereon as income receivable within the meaning of the Income Tax Act, 1918, s. 5, sub-s. 3 (*c*). They accordingly discharged the assessment.

Immediately upon the determination of the appeal the Commissioners of Inland Revenue expressed their dissatisfaction with the determination as being erroneous in point

of law, and in due course have required the Special Commissioners to state and sign a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 7, sub-s. 6, and s. 149, which case the Special Commissioners stated and signed accordingly.

These three appeals were heard together.

Sir Douglas Hogg A.-G., Stafford Crossman and *R. P. Hills* for the Crown.

Latter K.C. and *Andrewes-Uthwatt* for the respondents.

Cur. adv. vult.

GASCOIGNE *v.* INLAND REVENUE COMMISSIONERS.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

At a meeting of the Commissioners held on June 22, 1920, for the purpose of hearing appeals, Cynthia Mary Trench Gascoigne, hereinafter called "the appellant," appealed against three assessments to super tax for the years ending April 5, 1917, April 5, 1918, and April 5, 1919, respectively made upon her under the provisions of the Finance (1909–10) Act, 1910, and subsequent enactments.

The appellant was the daughter of Colonel Frederick R. T. Trench Gascoigne and came of age on February 9, 1919.

Under the will of her grandfather the late Frederick Charles Trench Gascoigne, who died on June 12, 1905, certain property in Ireland (hereinafter called "the Irish property") was devised to trustees (the said Frederick R. T. Trench Gascoigne and another) in trust for the appellant if living at his decease, the property during her infancy to be managed and the rents and profits thereof to be received by the said Frederick R. T. Trench Gascoigne to invest the same so that they should accumulate at compound interest and be paid to the appellant on her attaining twenty-one years or marrying under that age. Should the appellant not be living at the date of the testator's death the property was to be held in trust for his grandson.

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The residue of the testator's real and personal estate was devised and bequeathed to the appellant absolutely, but if she should die under the age of twenty-one years and without having been married, then to the said grandson absolutely.

The assessments which were the subject of the case were made on the appellant in the gross amount of the income arising from the Irish property and the testator's residuary estate in the respective previous years. The assessments were made on January 1, 1920, and the notices of assessment issued to the appellant on January 5, 1920.

On behalf of the appellant it was contended (inter alia) :—

(1.) As regards the Irish property: (*a*) that a trust had been established under the terms of which the whole of the income was to be accumulated until the appellant had become of age, and that until that eventuality had occurred no income had emerged to her which was liable to super tax; (*b*) that the appellant had no power in the intervening period to demand any of the income, and that if she had died during that period her representatives could not have claimed any of the income accrued to the date of her death; (*c*) that the accumulations paid to the appellant when she became of age represented capital and not income liable to super tax; and as regards the residuary estate: (*d*) that the word "absolutely" used in connection with this request related to the nature of the estate and not to the time at which the bequest was deemed to have taken place; (*e*) that it was a contingent gift which did not become a vested interest until the appellant had attained twenty-one years and had thereby defeated the contingency; (*f*) that no power had been received for granting any sums for the maintenance of the appellant during her minority, and although in law a beneficiary entitled to a contingent gift from a person "in loco parentis" was entitled in case of necessity to the release of a certain income for maintenance, that sum could not represent the whole of the income of the legacy but only such sums as the Courts might allow; (*g*) that although for some purposes the corpus might be held to have become absolutely vested in the appellant on the death of the testator, for taxation

purposes it could not be said that any part of the income could have been demanded or received by her during her minority; (*h*) that the accumulations when eventually received by the appellant represented capital and not income.

(2.) That the assessments were bad in law and that by virtue of the provisions of s. 41 of the Income Tax Act, 1842, the assessments should have been made in the name of the trustees, and that in any event as to the years they were out of time.

On behalf of the respondents it was contended (inter alia) :—

(1.) As regards the Irish property: (*a*) that the property had been given absolutely to the appellant on the death of the testator with no gift over; (*b*) that there was no contingency present, and had the appellant lived for one day only subsequent to the testator's death the whole of the interest in that property vested in her absolutely; (*c*) that as the corpus vested in her absolutely it was immaterial that the income might have been held for the appellant by trustees during her minority.

(2.) As regards the residuary estate: (*a*) that the property had been bequeathed absolutely to the appellant on the death of the testator, and that there had been a gift over on the happening of certain events; (*b*) that the income had accrued year by year and was none the less income because it had been held by the trustees and had only been paid over to the appellant when she attained the age of twenty-one years.

(3.) That the whole of the income of both the Irish estate and the residuary estate in question had borne income tax by deduction and, under the provisions of s. 66 of the Finance (1909–10) Act, 1910, it was assessable to super tax.

(4.) That s. 41 of the Income Tax Act, 1842, was merely machinery to reach the ultimate beneficiary whose income it was desired to tax, and that in the present case there was no question of trustees at the date when the

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super tax assessments were made, as the appellant was then of age.

In the course of the hearing the following cases were referred to: *Stretch* v. *Watkins* (1); *Barber* v. *Barber* (2); *Breedon* v. *Tugman* (3); *In re Buckley's Trusts* (4); *In re Wells* (5); *In re Humphreys* (6); *In re Bowlby* (7); *Ex parte Huxley*. (8)

The Commissioners gave their decision as follows:—

"In this case it is necessary to ascertain the precise terms of the will with reference to the Irish Estate and the residue of the real and personal estate respectively.

"As regards the Irish Estate. As Miss Gascoigne was living at the decease of the testator her interest became vested at his death, and although the income (i.e., the rents and profits) arising from the Irish Estate had to be invested and accumulated for a certain period that income was nevertheless the income of Miss Gascoigne.

"As regards the residue. Miss Gascoigne obtained a vested and absolute interest in the residue on the death of the testator. The vested interest was liable to divest if she died under the age of twenty-one years and unmarried: see *In re Buckley's Trusts* (4); *In re Wells* (5); *In re Humphreys*. (6)

"In the case of *In re Bowlby* (7), which was relied upon by the appellant, the legacy was not vested but was contingent upon the legatee attaining the age of twenty-one years.

"It follows, therefore, that in the case both of the Irish Estate and the residue the income arising therefrom was the income of Miss Gascoigne.

"The point remains whether the assessments made upon Miss Gascoigne (as opposed to assessments on her trustees) in respect of the years during which she was an infant can be upheld. Miss Gascoigne attained the age of twenty-one years on February 9, 1919. The assessments were made in December, 1919, and the notices of assessment were served on January 5, 1920.

(1) (1816) 1 Madd. 253.
(2) (1838) 3 M. & C. 688.
(3) (1834) 3 My. & K. 289.
(4) (1883) 22 Ch. D. 583.
(5) (1889) 43 Ch. D. 281.
(6) [1893] 3 Ch. 1.
(7) [1904] 2 Ch. 685.
(8) [1916] 1 K. B. 788.

"In our opinion the assessments are valid in law. They were made within the requisite period upon Miss Gascoigne after she had attained twenty-one years of age in respect of income which had suffered tax by way of deduction. By s. 66 of the Finance (1909–10) Act, 1910, super tax is charged in respect of the income of any individual. These words are wide enough to include minors: see *Ex parte Huxley* (1), and we accordingly confirmed the assessments."

The appellant immediately upon the determination of the appeal declared her dissatisfaction therewith as being erroneous in point of law, and in due course required the Commissioners to state a case for the opinion of the High Court, which case the Commissioners stated and signed accordingly.

Cyril King for the appellant.

Sir Douglas Hogg A.-G., Stafford Crossman and *R. P. Hills* for the Crown.

Cur. adv. vult.

Dec. 20. ROWLATT J. read the following judgment: In all these four cases I am of opinion that the income was income liable to super tax. In the case of the Longford Settlement of 1862 this result was contended for on the part of the Attorney-General by a detailed argument rested upon the rule against perpetuities. To the relief of all concerned this argument was not contested.

As regards the income under the Longford Settlement of 1899 and the income in Miss Gascoigne's case liability was contested on the part of the subject on the strength of my own decision in *Inland Revenue Commissioners* v. *Blackwell.* (2) I rather doubt, in view of the further consideration of the subject for which these cases have afforded me the opportunity, as well as of what occurred in that case in the Court of Appeal (3), whether my view was right. However that may be, I think the income in these cases was the income of the infant year by year as it accrued. In *Blackwell's* case (2) I thought that the income was not his income and that when he received the accumulated sum

(1) [1916] 1 K. B. 788; 7 Tax Cas. 49.

(2) [1924] 2 K. B. 351.

(3) See [1926] Ch. 223; [1926] 1 K. B. 389.

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on attaining his majority he received it as capital. It was at that point that I went wrong, if wrong I was. In these cases I think that the section of the Conveyancing Act, 1881, in the Earl of Longford's case, and the clause in the will in Miss Gascoigne's case, merely put the trustees in the position of bankers for the infant, if I may use that phrase, to hold and invest the money on his behalf until his majority. The Commissioners decided against the Crown on the ground that it was not income "receivable" within the meaning of s. 5, sub-s. 3 (*c*), of the Income Tax Act, 1918, within the year. This conclusion I think wrong for the reasons given in *Blackwell's* case (1), which I will not repeat.

In these circumstances the result in Miss Gascoigne's case is that her appeal must be dismissed with costs.

In Lord Longford's case there remain very important questions of machinery. As regards the last of the series of years in question (namely, 1920–1921), the infant himself was assessed on the whole of the income to which he was entitled under the settlements. The Commissioners, for reasons to which I have already adverted, reduced the assessment to the amount which he had actually received by way of allowance, and the Crown are entitled to have it restored to the full amount unless the infant is unassessable in person. I can see no reason for so holding (see *Ex parte Huxley* (2)), and therefore in that case the appeal succeeds with costs.

As to the preceding years the questions are as follows :—

(1.) Can his mother as guardian be assessed in respect of all his income for the year 1916–1917 under the settlement of 1899, though she handled on his behalf only an amount below the super tax limit ?

(2.) Can the trustees of the settlement of 1899 be assessed for the year 1917–1918 in respect of the infant's income under that settlement ? There is no question here of assessing them in respect of income under any settlement with which they had no concern. The question is the broad one whether trustees can be assessed to super tax at all.

(3.) Can these same trustees be assessed for the years 1918–19 and 1919–20 in respect of the income under their

(1) [1924] 2 K. B. 351. (2) [1916] 1 K. B. 788.

own trust, together with the income under that of 1862, with which they had no concern, and of course in an amount and upon a scale dependent on the aggregate of the two incomes?

As regards the guardian I wish first to advert to the provisions of s. 161 of the Income Tax Act, 1918, in order to get them out of the way. That section does not authorize an assessment. It assumes default in payment by the infant, and that, it seems to me, involves the assessment of the infant. One may observe in passing that it is here that we find what would generally be effective machinery for the recovery of tax upon the income of an infant. This was, I think, the view of the Lords Justices in *Ex parte Huxley*. (1)

The question is therefore whether, by virtue of s. 7, sub-s. 6, of the Income Tax Act, 1918, and r. 4 of the General Rules to All Schedules, what I may call representative assessments can be made upon trustees and guardians on the actual total income of the beneficiary. If not, a secondary point might arise—namely, whether they can be made on a total income taken as regards the particular trustee or guardian as limited to the income with which the trust or guardianship is concerned. The Attorney-General did not, however, contend for this, so I do not deal with it.

For income tax purposes under the Act of 1842, and still under the Act of 1918, there is no obligation to make a general return of, and no assessment is made on, total income. As pointed out by Lord Macnaghten in *London County Council* v. *Attorney-General* (2), any such idea was foreign to the scheme of the Act of 1842. The tax was and is imposed Schedule by Schedule, and its assessment and collection were and are divided locally among the places where the income arises. It is inconceivable in my view that for income tax purposes trustees or guardians or agents for non-residents (who in the Act of 1842 and now under r. 5 of the General Rules to Schedules A, B, C, D and E are found in association with trustees and guardians) should be assessable save in respect of the trust, the guardianship or the agency. No distinction was suggested by the Attorney-General between

(1) [1916] 1 K. B. 788. (2) [1901] A. C. 26, 37.

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trustees for incapacitated persons and agents for non-resident persons, in whose name the non-resident is assessable.

Under the Act of 1842, agents were only assessable if they had the receipt of the profits or gains. Necessarily therefore they were only assessable in respect of the income of the agency. By the Finance Act, 1915, that limitation has been removed, and I understood the Attorney-General to contend that this leaves an agent exposed to assessment to income tax in respect of any British income of his non-resident principal (and, I think he should have added, of his wife). The only limitations he would concede were that the agent must be an agent for income and not (e.g.) an agent for sale or purchase of a mere investment, and secondly that he must still be agent at the time of assessment. It seems to me, however, that the immunity of an agent from assessment in respect of income unconnected with his agency did not depend on the requirement that he should be in receipt of the profits or gains taxed, but is fundamental, arising from the natural construction of the Act.

This being the position of these representative persons for income tax purposes, I now come to super tax. This tax is administered by one central authority, and the territorial and piecemeal organization of income tax, as has been pointed out in the House of Lords, does not apply to it. It depends also on one general return bringing the income of the individual under all Schedules and in all places into one total. Against this total may be set deductions unconnected with any particular item of the income, as, for instance, annual payments of interest (see *Earl Howe* v. *Inland Revenue Commissioners* (1)) and (until recently) life assurance premiums.

By s. 7, sub-s. 2, of the Act of 1918 persons assessable to income tax as representing incapacitated, non-resident or deceased persons (as to these latter see r. 18 of the General Rules for Schedules A, B, C, D and E) may be required to make a return of the total income of the person represented. In *Brooke* v. *Inland Revenue Commissioners* (2) Swinfen Eady L.J. expressed the opinion that under this rule a trustee was bound to the

(1) [1919] 2 K. B. 336, 348. (2) [1918] 1 K. B. 257, 265.

best of his ability to include in the return income outside his trust. The liability to assessment depends, however, not on this sub-section but on sub-s. 6. The Attorney-General nevertheless based an argument on sub-s. 5 in connection with sub-s. 2 as follows. As (he said) under sub-s. 5 it is only if there is a failure to make a return, or if the Special Commissioners are not satisfied with it, that they can assess according to the best of their judgment, therefore, when there is such a return as that described by Swinfen Eady L.J. they must, unless dissatisfied, assess the person returning and upon the total amount returned. I do not think this is involved in the words used. I see no reason why they should not on the information in the return make an assessment on the beneficiary. The right to assess the representative depends on sub-s. 6.

By this sub-section all the provisions of the Income Tax Act, 1918, relating (inter alia) to persons who are to be chargeable with income tax and to income tax assessments are, so far as applicable, to apply to the charge and assessment of super tax. That sub-section does not specifically mention, as did sub-s. 2, persons chargeable in a representative capacity. If they are included it is under the general words "persons chargeable" and the inclusion is not limited to persons representative of incapacitated, non-resident and deceased persons to which the provision in sub-s. 2 is confined. If all persons chargeable to income tax are also chargeable to super tax in respect of the total income (whether their own or another's) of which that in respect of which they are charged to income tax forms part then it would seem to follow that every occupier chargeable with the landlord's tax under Sch. A (see No. VII., r. 1) would be chargeable with his landlord's super tax. A receiver appointed by the Court (see General Rules applicable to Schedules A, B, C, D and E, r. 15) would be in an analogous position. Every railway company would be chargeable by reference to Sch. E, r. 7 (2.), with the super tax of its higher officials. Perhaps even partners by reference to Sch. D, rr. 10 and 12 of Cases I. and II., would be liable to be jointly assessed for the super tax of all of them.

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Other persons exposed to this liability would be the collectors of tithes, royalties and fines (Sch. A, No. II. and rules), the managers of mines and the like (Sch. A, No. III.), and the occupier of lands subject to tithes. Doubtless there are other persons in like situation. None of these persons would necessarily have adequate security for their indemnity. They could not command knowledge of the other income of their principals, or of the deductions available, nor could they independently promote an appeal. These are very startling consequences. The truth is that the machinery applicable to the compartments into which incomes divide themselves for income tax purposes does not fit in this respect a tax like super tax imposed on income in the bulk.

There is another way in which it can be put. The question is whether (say) a trustee is chargeable to super tax in respect of income of his beneficiary outside his trust. Now there is no provision which makes him chargeable with income tax in respect of such income, and therefore none, it seems to me, by the application of which he can be made chargeable to super tax in respect of it. Perhaps an example may make it clearer. Suppose between 1910 and 1915 an agent for a non-resident person (say) exercising a trade on his behalf by making contracts but not in receipt of the profits or gains. He was not liable for income tax thereon. But if he received any other income for the principal he thereby (according to the present argument) became liable for super tax upon the first named profits. This by the application of the income tax principle by which he was not liable.

The conclusion I have come to does not involve the consequence that there is nothing in the charge of super tax to which the income tax provisions as to persons chargeable can be applied under the sub-section. It is to be observed that s. 4, like the section in the Finance (1909–10) Act, 1910, which it replaces, merely creates super tax in respect of the income of any individual. Sect. 5, sub-s. 2, which makes income tax assessments conclusive for super tax purposes, was not to be found in the Finance (1909–10) Act, 1910. It was to be expected that some reference would be

found to the person chargeable even if there was no such thing as representative chargeability to income tax. One important effect of the application of the income tax provisions is to make a husband chargeable to super tax on his wife's income as if it were his own. It is possible also that it is only under this sub-section that executors can be charged.

In the result the appeal of the Crown as regards the years 1918–19 and 1919–20 fails.

The question remains whether the trustees can be assessed for the year 1917–18 on the income of their own trust being in fact the total income of the infant. I think I must deal with this point, as the facts directly raise it, though the Attorney-General did not contend for any such limited success, pinning his faith to the larger view. If I may say so I think he was right, because in my view if trustees and the like are not assessable on the total income simpliciter the accident that there is no other income can make no difference. The non-existence of other income is a fact outside their sphere as much as the quantum of it, if there is any. Moreover the difficulty as to independent deductions still applies. I think therefore that the appeal in respect of this year fails also and must be dismissed with costs.

The trustees have been assessed on the income actually allowed to the infant and they have not appealed, being content to pay on those figures. It was not suggested that they are precluded from arguing the point of principle in resisting the larger demand.

Appeal of the Crown allowed in the Earl of Longford's case and dismissed in the Trustees' case and the Countess of Longford's case. Appeal dismissed in Gascoigne's case.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for Earl of Longford, Countess of Longford and Trustees: *Walfords.*

Solicitors for Miss Gascoigne: *Maxwell, Simpson & Co., for Simpson, Peckover, Curtis & Batley, Leeds.*

R. F. S.

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15, 21.

F. KOECHLIN ET CIE *v.* KESTENBAUM BROTHERS.

[1926. F. 577.]

Bill of Exchange—Foreign Bill—Indorsement—Acceptance in England—Indorsement in France by Agent of Payee in his own Name with Payee's Authority—Valid Indorsement in France—Sufficiency of Indorsement in England—Liability of Acceptors to Indorsees—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 31, *sub-s.* 3; 32, *sub-s.* 1; 72, *sub-ss.* 1, 2.

By s. 31, sub-s. 3, of the Bills of Exchange Act, 1882, "A bill payable to order is negotiated by the indorsement of the holder completed by delivery."

By s. 32, sub-s. 1: "An indorsement in order to operate as a negotiation . . . . must be written on the bill itself and be signed by the indorser. . . . ."

By s. 72, sub-s. 1: "Where a bill drawn in one country is negotiated, accepted, or payable in another . . . . the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement . . . . is determined by the law of the place where such contract was made."

By sub-s. 2: "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance . . . . is determined by the law of the place where such contract is made."

A bill of exchange was drawn in France by E. V. upon the defendants in London to the order of M. V. It was sent to the defendants and returned accepted by them payable at a London bank. The bill was discounted by the plaintiffs in France, the bill having been indorsed by E. V. in his own name, on behalf, and with the authority, of M. V. It was duly presented for payment on behalf of the plaintiffs, but payment was refused, reliance being afterwards placed by the defendants upon the fact that the bill did not bear the indorsement of M. V., the original payee. According to French law a valid indorsement might be made by an agent signing his own name, if so authorized by the payee. In an action by the indorsees upon the bill against the acceptors:—

Held, that the contract of the acceptor of a bill payable to order was under s. 31, sub-s. 3, and s. 32, sub-s. 1, of the Bills of Exchange Act, 1882, to pay a holder only if the bill bore by way of indorsement the signature of the payee, and that as this bill did not bear that signature the acceptors had not contracted to pay it; that s. 72, sub-s. 1, of the Bills of Exchange Act did not let in foreign law to dispense with the requirement of English law as to the signature of the payee on the bill itself; and that the indorsement on the bill was an indorsement not recognized by the law of England and therefore there was no indorsement to be interpreted by foreign law within the meaning of s. 72, sub-s. 2.

ACTION tried before Rowlatt J. as a short cause.

According to the statement of claim indorsed on the writ

the action was brought by the plaintiffs, F. Koechlin & Cie, against the defendants, Kestenbaum Brothers, to recover the sum of 461*l.* 10*s.* as acceptors of a bill of exchange for 60,000 frs. (French) dated December 14, 1925, drawn by M. Vigderhaus, payable at the end of February to order of the said M. Vigderhaus and indorsed by him to the plaintiffs.

The bill, which was drawn in France, was in the following terms :—

"Paris le 14 Decembre, 1925. francs français
B.P.F. 60,000 450*l.*

A fin Février 1926 veuillez payer contre ce Mandat à Ordre M. Vigderhaus la somme de soixante mille francs valeur reçue en marchandises.

E. Vigderhaus.

A. M. Kestenbaum Bro.,
21 Manchester Ave.,
Aldersgate Str., London."

The bill was indorsed :—

"Payez à l'ordre de F. Koechlin & Cie valeur en compte. Paris le 15 Dec. 1925. E. Vigderhaus.

"Payez à l'ordre de la Banque de France, Paris le 30 Decembre, 1925, p.pro de F. Koechlin et Cie. R. Derman.

"Payez à l'ordre de Lazard Brothers & Co. (Lmtd.) valeur en recouvrement. Paris le 15 Févr. 1926. Le Caissier Principal de la Banque de France par Délégation. D.M.

"P.p. Lazard Brothers & Co., Ltd. S. Palmer."

Evidence was given on behalf of the plaintiffs that M. Vigderhaus had in 1923 given authority to his son, E. Vigderhaus, to sign and indorse all cheques, bills or commercial documents, receipts, and payments in his own name for account of M. Vigderhaus, and that a number of cheques and bills had been so signed by E. Vigderhaus and had been duly honoured.

The bill in question had been signed in blank by E. Vigderhaus in his own name and then sent to the defendants in London, who had filled up the bill, accepted it payable at Barclays Bank, London, and then returned it to

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M. Vigderhaus in Paris, who had discounted it with the plaintiffs in France, after it had been indorsed by E. Vigderhaus in his own name. The bill was duly presented for payment by or on behalf of the plaintiffs, when payment was refused. The plaintiffs thereupon brought the present action.

The defence set up in the affidavit for leave to defend under Order XIV. was that the bill had not been duly and properly indorsed by M. Vigderhaus to the plaintiffs; and that therefore the plaintiffs were not holders for value in due course.

Evidence was given by a French advocate that if an agent was duly authorized by his principal to sign on behalf of his principal a signature or indorsement by the agent in his own name was a valid signature or indorsement according to French law, and that it was not necessary to add the words "per pro."

No evidence was called on behalf of the defendants.

du Parcq K.C. and *R. F. Levy* for the plaintiffs. This bill having been drawn in France and accepted in England, its validity as regards requisites in form is by s. 72, sub-s. 1, of the Bills of Exchange Act, 1882, determined by the law of the place of issue, and its validity as regards requisites in form of a supervening contract such as indorsement is determined by the law of the place where such contract was made, which in the present case was France. By s. 72, sub-s. 2, the interpretation of the drawing, indorsement, or acceptance of a bill is determined by the law of the place where such contract is made. It was held in *Trimbey* v. *Vignier* (1) that the rule in a case of a contract made in one country and put in suit in another country was that the interpretation of the contract must be governed by the law of the country where the contract was made, and accordingly it was held that the holder of a bill drawn in France and indorsed there in blank could not recover against the acceptor in this country, because the effect of the indorsement had

(1) (1834) 1 Bing. N. C. 151.

to be determined by French law, and in France such an action would not be maintainable, as such indorsement operated not as a transfer but only as a procuration. That decision was followed in *Bradlaugh* v. *De Rin* (1), in a case where the bill of exchange was drawn in France and accepted in London, and when it was held that it must be governed by French law. According to the evidence the indorsement in this case was a good indorsement according to French law, and therefore the plaintiffs are entitled to recover on the bill against the acceptors in this country.

N. L. Macaskie for the defendants. It is clear that, by English law, if a bill is assigned without an indorsement the transfer gives to the transferee only such rights as the transferor had in the bill; the bill is not negotiated unless the holder of the bill obtains an indorsement: see Bills of Exchange Act, 1882, s. 31, sub-ss. 1, 4; *Harrop* v. *Fisher* (2); and *Whistler* v. *Forster*. (3) The mere act of delivery does not give the person to whom the bill is delivered authority to indorse the bill in the name of the person who transferred it: *Harrop* v. *Fisher*. (4) If a bill is not indorsed by the person upon whom it is drawn it cannot be validly negotiated. An agent must state on the bill the capacity in which he indorses. That was not done in the present case. Sect. 25 of the Bills of Exchange Act, 1882, provides that "a signature by procuration operates as notice that the agent has but a limited authority to sign," and s. 26, sub-s. 1, provides that "where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon." Sect. 91 provides that where an instrument is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by his authority, nevertheless the signature, although it may be written by the hand of an agent, must be the signature of the principal and not of the agent: see

(1) (1868) L. R. 3 C. P. 538.
(2) (1861) 10 C. B. (N. S.) 196, 203.
(3) (1863) 14 C. B. (N. S.) 248, 258.
(4) 10 C. B. (N. S.) 196.

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Chalmers' Bills of Exchange, 8th ed., p. 77. The presumption is that the general law of a foreign country is the same as the English law unless the contrary be proved: see per Lord Parker of Waddington in *The Parchim.* (1) This bill ought to be treated as an English bill, because by the statement of claim indorsed on the writ it is stated to have been both drawn and indorsed by M. Vigderhaus. By s. 72, sub-s. 2, the interpretation of the acceptance of a bill is determined by the law of the place where such contract is made, and therefore in this case the rights of the defendants as acceptors must be governed by English law, and they cannot be affected by the negotiation of the instrument in a foreign country: see *Lebel* v. *Tucker*, per Lush J. (2) By s. 54 "the acceptor of a bill by accepting it engages that he will pay it according to the tenor of his acceptance," and therefore he is entitled to require that the indorsement shall be in accordance with his contract of acceptance. It is true that the contract of indorsement is governed by French law, but that is only as between indorser and indorsee.

du Parcq K.C. in reply. In *Trimbey* v. *Vignier* (3) the holder of a bill drawn in France and indorsed there in blank was held not entitled to recover against the acceptor in England, because the indorsement had to be interpreted by French law, and by that law an indorsement in blank did not operate as a transfer of the bill. In *Lebel* v. *Tucker* (4) the bill was an inland bill, drawn, accepted and payable in England, and it was held that an indorsee could maintain an action in England under an indorsement made in France which was valid by the law of England but which by French law gave the indorsee no right to sue in his own name. There is a proviso to s. 72, sub-s. 2, that "where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom." In *Bradlaugh* v. *De Rin* (5) the Court followed

(1) [1918] A. C. 157, 161.
(2) (1867) L. R. 3 Q. B. 77, 85.
(3) 1 Bing. N. C. 151.
(4) L. R. 3 Q. B. 77.
(5) L. R. 3 C. P. 538.

the decision in *Trimbey* v. *Vignier* (1) and held that the acceptor of a bill drawn in France, which was accepted in England, but indorsed in France in blank, and which therefore was not sufficient by French law to entitle the indorsee to sue on it in his own name, was not liable to be sued on it in this country notwithstanding that the indorsement was sufficient by English law. That decision was reversed in the Exchequer Chamber (2) on the question of fact whether the indorsee could according to French law sue the holder in his own name, but the principle that the indorsement must be interpreted by French law was not questioned. In *In re Marseilles Extension Railway and Land Co.* (3) bills of exchange were drawn in France by a domiciled Frenchman in the French language, in English form, on an English company, who duly accepted them. The drawer indorsed the bills and sent them to an Englishman in England, and it was held that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law. The rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by indorsement: *Alcock* v. *Smith* (4); *Embiricos* v. *Anglo-Austrian Bank.* (5) In the latter case Vaughan Williams L.J. expressed the opinion that the indorsement of a bill of exchange in a foreign country, valid under the foreign law but invalid under English law, would be effectual to give the indorsee a good title to the bill as against the drawer or acceptor.

N. L. Macaskie replied on the cases.

Cur. adv. vult.

1926. Dec. 21. ROWLATT J. read the following judgment.

The bill upon which this action is brought was drawn in France by E. Vigderhaus upon the defendants in London

(1) 1 Bing. N. C, 151.
(2) (1870) L. R. 5 C. P. 473.
(3) (1885) 30 Ch. D. 598.
(4) [1892] 1 Ch. 238.
(5) [1905] 1 K. B. 677.

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to the order of M. Vigderhaus. It was sent to the acceptors, and returned accepted payable at a London bank. It was presented for payment on behalf of the plaintiffs, or of a subsequent indorsee, but it did not bear the indorsement of M. Vigderhaus, the original payee, the first indorsement being "E. Vigderhaus." This indorsement was affixed, on behalf of M. Vigderhaus, in France, and by his authority, and the bill was negotiated in France. The question is whether the plaintiffs can recover on the bill against the acceptors.

Evidence was given on behalf of the plaintiffs by a French lawyer, who deposed that a valid indorsement might be made according to French law by an agent signing his own name if so authorized by the payee. Although I admit that this evidence surprised me, it was not contradicted, and I accept it for the purpose of this judgment. It is to be observed that the signature was the signature of the drawer of the bill, who happened to be the agent employed in this case, but the signature might have been that of a total stranger to the bill if such a person had been authorized.

By s. 31, sub-s. 3, of the Bills of Exchange Act, 1882, a bill "payable to order" is negotiated by the indorsement of the holder completed by delivery. By s. 32, sub-s. 1, the indorsement must be written on the bill itself and signed by the indorser. The contract, therefore, of the acceptor of a bill "payable to order" is to pay a holder only if the bill bears by way of indorsement the signature of the payee. This bill, on inspection, does not bear such signature, and, prima facie, the acceptors have never contracted to pay it in that condition.

But it is said that s. 72, sub-s. 1, imposes this liability upon them on the ground that it is a question of the "validity as regards requisites in form" of the indorsement, as to which French law governs. In my view, this sub-section does not let in the foreign law to dispense with the signature of the payee written on the bill itself, which s. 32, sub-s. 1, requires, just as I do not think that foreign law could be let in to declare that a bill "payable to order" could be transferred

by mere delivery or by writing contained in an independent document. If the foreign law of the place of indorsement declares that something more is necessary, that requirement must be observed. If a forged indorsement becomes, under the law of the place, effectual by subsequent negotiation of the bill to a bona fide holder for value without notice, as was the case in *Embiricos* v. *Anglo-Austrian Bank* (1), that too will be effectual here, though not by virtue of this sub-section, as it is not a question of validity as regards requisites in form. But no case seems to me to suggest that an acceptor can be called upon to overlook the absence of an apparent chain of regular indorsements. The bill in this case does not appear to be in order. In *Embiricos* v. *Anglo-Austrian Bank* Vaughan Williams L.J. expressed himself as follows (2): "It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract." I think my decision in the present case exactly applies that formula. This is an indorsement not recognized by the law of England. It is not merely an indorsement invalid by that law. I have not overlooked s. 72, sub-s. 2, by which the law of the place of indorsement governs its interpretation. Whatever scope may be assigned to the word "interpretation," there is no indorsement here within the meaning of the Act to interpret.

There will be judgment for the defendants, with costs.

Solicitors for plaintiffs: *Herbert Baron & Co.*

Solicitor for defendants: *Henry Snowman.*

(1) [1905] 1 K. B. 677. (2) [1905] 1 K. B. 684.

R. F. S.

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Oct. 14;
Nov. 11.

RIVERSDALE MILL COMPANY, LIMITED, APPELLANTS *v.* HART, RESPONDENT.

Master and Servant—Wages earned—Mode of Calculation—Bad Work—Deductions—Truck Act, 1831 (1 & 2 *Will.* 4, *c.* 37), *ss.* 3, 4—*Truck Act*, 1896 (59 & 60 *Vict. c.* 44), *ss.* 2, 9.

The respondent was employed by the appellants as a cotton weaver at their mill at Bolton, Lancashire, under a customary contract whereby the appellants were to find the warp and the weft, and the respondent was to weave it into cloth. It was the duty of the respondent to weave a good merchantable cloth by performing her work without negligence. She was to be paid according to a standard list, an implied condition of which was that the prices in the list should apply to good merchantable cloth. If the workmanship of a weaver was bad or negligent, there was a custom to pay a sum less than that in the list—namely, the standard list price less compensation assessed by the employer of a reasonable amount for the loss suffered by him for damage to his cloth. The respondent was negligent in performing her work, and the appellants deducted 6*d.* for bad work from the standard list price, which was admitted to be a fair and reasonable sum and less than the actual loss caused to the appellants. On her complaint the justices found that the sum of 6*d.* was illegally deducted in contravention of s. 3 of the Truck Act, 1831, and gave a verdict for the respondent for that amount, and for the appellants for 1*s.* upon a counterclaim for the damage sustained by them.

By an Order made by the Secretary of State under s. 9 of the Truck Act, 1896, exemption from the provisions of that Act was granted to persons engaged in the weaving of cotton in Lancashire :—

Held (by Avory J. and Salter J., Lord Hewart C.J. dissenting), that the effect of the findings of the justices was that the respondent was employed to weave a good merchantable cloth under an implied contract that she should be paid according to a standard list, subject to a fair and reasonable deduction for bad work, and that the 6*d.* being a fair deduction, the amount paid to the respondent represented the entire amount of the wages earned by her; that by reason of the order of the Secretary of State, the appellants were not affected by the provisions of the Truck Act, 1896, and were entitled to make deductions for bad work in calculating the wages earned, and that the decision of the justices was therefore wrong.

Per Lord Hewart C.J. The entire amount of the wages payable to the workman was the amount specified in the standard list, and not that amount less an uncertain sum to be assessed by the employers by way of damages, and the case was therefore concluded by the decision in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* [1906] A. C. 136.

CASE stated by justices of Bolton.

At a court of summary jurisdiction a complaint was

preferred by Nellie Hart (hereinafter called "the workman") under the Employers and Workmen Act, 1875, against the Riversdale Mill Co., Ld. (hereinafter called "the employers"), claiming the sum of 6*d.*, the balance of wages alleged to be due to her as a weaver in the service of the employers and unlawfully deducted from the workman's wages. (1)

The court found that the sum of 6*d.* was illegally deducted, and gave a verdict for the workman for that amount. They also gave a verdict for the employers on a counterclaim for 1*s.* in respect of damages sustained by them through the negligence of the workman during her contract of service. Upon the hearing of the complaint the following facts were proved or admitted :—

That the workman was negligent, and that the 1*s.* claimed by the employers was a fair claim for the damage done to their cloth through the negligence of the workman.

The workman was employed by the employers as a cotton weaver at their cotton weaving mill at Darcy Lever, Bolton, Lancashire, under a customary contract of service whereby the employers were to find the warp and the weft and the workman was to weave the same into cloth.

It was the duty of the workman to weave a good merchantable cloth by performing her work without negligence and in a careful manner. The workman was to be paid for her work according to a "standard list," an implied condition of which was that the prices in the list should apply to good merchantable cloth produced by the observance by the workman of her duty as a weaver.

In the event of the material provided by the employers being defective, there is a practice to pay a sum higher than

(1) Truck Act, 1831, s. 3: "The entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated" (of which the weaving trade is one) "in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, ... otherwise than in the current coin aforesaid, ... shall be . . . . illegal, null, and void."

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that contained in the standard list as payment for extra work due to defective material.

If the workmanship of a weaver was bad or negligent, there is, and has been for many years, a custom to pay a sum less than that contained in the standard list—namely, the standard list price less compensation assessed by the employer of a reasonable amount in respect of the loss suffered by the employer for damage to his cloth. It was admitted that the deduction of 6*d.* made in this case for bad work was fair and reasonable and less than the actual loss caused to the employers.

Deductions for bad work are, and have been for many years, the usage and custom in the cotton weaving trade of Lancashire, and have always been, and are, an incident of a weaver's contract of service, and have always been, and are, taken into account in calculating the correct wages. It was admitted by the employers' witnesses that fines and deductions for bad and negligent work had always been objected to on principle by the workmen as a class.

The justices, being of opinion that the standard list was the rate of wages applicable, held that the employers had illegally deducted 6*d.* by way of fine from the wages of the workman. The amount paid to the workman was 8*s.* 5½*d.*, being 8*s.* 11½*d.*, the "standard list" price, less 6*d.* deduction for bad work.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

By an Order made on March 3, 1897, under s. 9 of the Truck Act, 1896, the Secretary of State granted exemption from the provisions of that Act in respect of persons engaged in the weaving of cotton in the county of Lancashire.

The employers appealed.

Cyril Atkinson K.C. and *H. Derbyshire* for employers.

Eastham K.C. and *Laski* for workman.

Cur. adv. vult.

1926. Nov. 11. The following judgments were read.

LORD HEWART C.J. This is a case stated by justices for the county borough of Bolton. It arises out of a

complaint or claim preferred by the present respondent under the Employers and Workmen Act, 1875, against the present appellants, the Riversdale Mill Co., Ld., who were the employers, for the sum of 6*d.*, being a balance of wages alleged to be due to the respondent as a weaver of the employers, and unlawfully deducted from her wages. That complaint or claim was heard on February 1, 1926. The justices found that the sum of 6*d.* was illegally deducted and they accordingly awarded the respondent that amount. The employers had counterclaimed for the sum of 1*s.* in the following terms: "Take notice that upon the hearing of this summons the defendants intend to set up a counterclaim against the plaintiff for damages sustained by the defendants by reason of the plaintiff's negligence in the discharge of her duties as a weaver and/or in the alternative damages for breach of contract of service. Particulars: April 28, 1925, To value of cloth belonging to the defendants and damaged by the plaintiff by reason of the plaintiff's negligence in the discharge of her duties as a weaver, 1*s.* . . . ." [His Lordship referred to the facts stated in the special case and continued:] In that state of facts it was contended by the workman that the claim was based upon the provisions of s. 3 of the Truck Act, 1831, whereby the entire amount of the wages is payable to the workman and no deduction is lawful, except the deductions mentioned in that Act. The employers, on the other hand, contended that s. 3 of the Act of 1831 had nothing to do with the deduction for bad work, that the Act dealt only with payment to a workman in kind instead of in coin, and that the amount of wages earned by and the amount of wages payable to a workman were not necessarily one and the same thing. Such is the case as stated, and upon the questions which it involves I have the misfortune to differ from the other members of the Court.

The first question which arises is: What was the amount of wages payable to the workman under the contract with the employers? The justices were of opinion that the

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standard list was the rate of wages applicable, and that, in my view, was a conclusion of fact by which this Court is bound if there was evidence to support it. In my opinion, there was ample evidence to justify such a conclusion. Indeed, on the facts as stated, I should have come to the same conclusion myself. It seems to me that the real contract between the parties was that wages for work done should be paid in accordance with the standard list, and that, if the workmanship was bad or negligent, the employers should be entitled to compensation, that is to say, to damages, to be assessed at a reasonable sum in respect of the loss suffered by them—a totally different thing from making a deduction from wages. The employers seem to have recognized that that was the true position by counterclaiming 1*s.* in respect of the damage sustained by them. Moreover, Mr. Eastham told us, and I accept what he said, that the argument for the employers before the justices proceeded on the basis that the 6*d.* here was in fact a deduction from the workman's wages and that it was permissible for employers to make a deduction from wages for bad work; and in the sheet of the wages book produced by the employers and exhibited to the case the column in which the deduction would appear is headed "Abatement for bad work, etc.," and this abatement would be made from the amount in the column headed "Weavers' Wages" in order to arrive at the amount in the final column headed "Net Wages."

I cannot help thinking that the argument advanced before us on behalf of the employers was an ingenious afterthought. The scheme of it was to get rid of any difficulty connected with deductions from wages by the simple device of saying that no deduction should be regarded as having been made from wages inasmuch as the amount of the wages was not ascertained until the deduction had been made. From what, then, are the deductions to be made? Apparently from some notional figure representing an ideal standard of wages which never becomes actual until suitable deductions have been made from it. I am bound to say that,

if this kind of reasoning is sound, both the Legislature and the Courts would appear to have wasted a good deal of time upon problems connected with the Truck Acts.

It follows that, in my opinion, "the entire amount of the wages" payable to the workman was the amount specified in the standard list, and not that amount less an uncertain sum to be assessed by the employers by way of damages, and if this view is correct, the case is concluded by the decision of the House of Lords in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1), where it was unanimously held that s. 3 of the Truck Act, 1831, renders illegal any deduction by an employer when he is paying wages other than the deductions expressly authorized by the Act.

With regard to the so-called custom to make deductions for bad work, it is sufficient to say that, even if the practice had been generally recognized and acquiesced in as a term of the contract by the workmen, instead of having been always objected to by them on principle, it would have been, in my opinion, illegal as a contravention of the provisions of the Truck Act, 1831.

It may be observed that if the appellants' contention that the entire amount of wages earned or payable is the amount specified in the standard list less an uncertain sum to be assessed by the employers for bad or negligent work were right, no weaver in Lancashire would ever know with any certainty what his wages are to be. If he were asked what wages he earns, he would have to say: "I do not know. There is a standard list of wages, but deductions of uncertain amount to be assessed by my employers on account of alleged bad work may be made from the wages specified in the standard list, so that I never know how much I am earning." Such a state of things is, in my opinion, quite contrary to the provisions and the spirit of the Truck Acts. See the analysis of the Act of 1831 in the judgment of Keating J., concurred in by Williams and Willes JJ., in *Archer* v. *James* (2)—an analysis, I may say, not differed from by the rest of the Court.

(1) [1906] A. C. 136. (2) (1862) 2 B. & S. 61.

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In view of the decision of the House of Lords already referred to, it is, I think, unnecessary to consider the arguments addressed to us with reference to the Truck Act of 1896. I think, therefore, that this appeal fails.

AVORY J. With the profoundest respect for the judgment just delivered by my Lord, I am unable to concur in it. The question before the justices in this case was whether the respondent, Nellie Hart, was entitled to claim from the appellants the sum of 6*d.* as the balance of wages due to her as a weaver in a cotton mill in Lancashire. The justices held that the said sum of 6*d.* had been illegally deducted from the wages by way of fine and gave judgment in her favour for that sum. On behalf of the respondent it is contended that the non-payment of the said sum of 6*d.* amounted to a deduction from the wages earned in breach of s. 3 of the Truck Act, 1831, and that under s. 4 of the same Act she was entitled to recover the same. On behalf of the appellants it is contended that the entire amount of the wages earned by the respondent had been actually paid to the respondent in accordance with the statute. In my view, the effect of the findings in the special case is that the respondent was employed to weave a good, merchantable cloth, under an implied contract that she should be paid for her work according to a standard list, subject to a fair and reasonable deduction for bad work. It is admitted that the 6*d.* is a fair and reasonable deduction in this case, and therefore, in my opinion, the amount paid to the respondent less the 6*d.* did represent the entire amount of the wages earned by her.

The question that arises is whether the calculation of the amount of wages in this manner is forbidden by the Truck Acts, 1831 to 1896, or by the decisions upon those Acts. With regard to the statutes, I find nothing in the principal Act of 1831 which expressly forbids a deduction for bad work in the calculation of the wages. The Hosiery Manufacture (Wages) Act, 1874, s. 1, expressly recognizes the right to deduct for bad workmanship. The Truck Act, 1896, by

s. 2, forbids any deduction from the sum contracted to be paid to the workman, or any payment by the workman to the employer for or in respect of bad work unless the terms of that section are complied with. In my opinion, this section impliedly recognized that deductions for bad work had theretofore been lawfully made in calculating the amount of wages due and introduced a new protection for the workman in respect to such deductions, but s. 9 of the Act of 1896 provides that the Secretary of State may grant exemptions from the provisions of the Act in respect of persons engaged in any particular trade within any specified area, and by Order made on March 3, 1897, the Secretary of State granted exemption from those provisions in respect of persons engaged in all branches of the weaving of cotton in the county of Lancashire. The result, therefore, is that while that Order remains in force the employer is not affected by the provisions of the Act of 1896, and in my view is entitled, as he was before that Act, to make deductions for bad work in calculating the amount of wages due. I see no difference in principle between this case and the case of the worker employed in piecework, the amount of whose wages cannot be calculated until it is ascertained at the end of the week what work she has done.

The question remains whether the decisions on these statutes are in conflict with the view which I have expressed. In the case of *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1), which was relied on for the respondent, there was no dispute that the entire amount of the wages had been earned by the workman, and the deduction which was objected to was for an antecedent debt due to the employer. It is true that in that case Lord Loreburn L.C. used the expression that the employer "in ascertaining how much is payable as wages . . . . can subtract nothing except the deductions expressly sanctioned by the Act," but I think that must be read in its application to a case where the entire amount of the wages earned by the labour of the workman is not in dispute. The cases of *Chawner* v. *Cummings* (2) and *Archer* v.

(1) [1906] A. C. 136, 140. (2) (1846) 8 Q. B. 311.

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James (1) were relied on by the appellants and, in my opinion, support their contention in this case. In both of those cases there was a difference of opinion in the Exchequer Chamber, but they were not dissented from in the House of Lords in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (2) On the contrary, both Lord Davey and Lord Atkinson, who commented upon them, expressed the opinion that the basis of the decision in those cases was that the alleged deductions were elements only in calculating the real amount of the workman's wages. Lord Davey said: "In *Chawner* v. *Cummings* (3) the plaintiff was presumed to have contracted upon the usual and well-known terms in the trade, and certain customary deductions which had been made from his nominal wages were held not to be in the nature of payment at all, but the mode of calculating and ascertaining the actual amount of his wages. *Archer* v. *James* (1) was a similar case, and was decided in the first instance on the authority of *Chawner* v. *Cummings*. (3) In the Exchequer Chamber three judges held that *Chawner* v. *Cummings* (3) was wrongly decided, and three other judges, on the other hand, approved the decision, and held that the deductions in question in the case before them were in the same category and were elements only in calculating the real amount of the workman's wages." Lord Atkinson said: "The several authorities cited appear to me to support rather than refute the contention of the appellants. They may, I think, be roughly divided into two classes—namely, those cases like *Chawner* v. *Cummings* (3), in which charges were made by the employer for the use of the instrument by which the workman did his work and earned his wage; and those like *Hewlett* v. *Allen* (4), in which payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts. . . . . In the first class of cases it was successfully contended that the charges made by the master were not

(1) 2 B. & S. 61.
(2) [1906] A. C. 136, 142, 146.
(3) 8 Q. B. 311.
(4) [1892] 2 Q. B. 662; [1894] A. C. 383.

deductions properly so-called from sums due for wages earned, but were sums to be taken into account in ascertaining the amount of wages actually earned."

In the case of *Pritchard* v. *James Clay (Wellington), Ld.* (1), this Court held that there had been an infringement of the Truck Act of 1896 on the ground that the provisions of that Act with regard to the deductions had not been complied with. In view of the fact that the cotton weaving trade in Lancashire is exempt from the provisions of that Act, I do not think that this decision has any application to the present question.

I, therefore, come to the conclusion that neither in the statutes nor in the reported decisions is there anything making it illegal to calculate the wages earned as was done in this case, and that the respondent was not in the circumstances entitled to recover the 6*d.*, and that the appeal should accordingly be allowed. The fact that the appellants put forward a counterclaim ought not, in my view, to be regarded as inconsistent with their contention on the main question, but only as an alternative to their defence, and it should, in the circumstances, be dismissed and this case remitted to the justices to enter judgment for the appellants on the claim and for the respondent on the counterclaim, with such costs as the justices may determine.

SALTER J. I agree that this appeal should be allowed. In my opinion, the justices were wrong on both points. They should have dismissed the claim and the counterclaim. The contract between the parties was wholly an implied contract —implied from the usage and course of dealing in the trade. The contract, so far as it deals with payment, provides for three events: First, where the employer provides good material and the workman does good work; secondly, where the workman does good work but the employer provides bad material; and thirdly, where the employer provides good material and the workman does bad work. In the first event, the agreed amount of the wages is the sum shown on the standard list. In the second event, the agreed amount

(1) [1926] 1 K. B. 238.

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of the wages is a sum larger than that shown on the standard list, but the method of ascertaining it is not set out in the case. In the third event, the agreed amount of the wages is a sum to be computed by subtracting from the standard list such sum as the employer reasonably considers to be fair. If the first event had happened the amount of wages earned by the workman would have been 8*s.* 11½*d.* If the second event had happened, the wages earned would have been some larger sum. The event which in fact happened was the third, and the employer subtracted from the 8*s.* 11½*d.* the sum of 6*d.* This was admittedly a reasonable sum, and the amount of wages earned by the workman was therefore 8*s.* 5½*d.* : 8*s.* 5½*d.* was paid to the workman in cash.

I entertain some doubt whether there was any evidence of a trade usage from which the term set out in the case could be implied in the contract, because it is found that the workmen always objected to the alleged usage. Further, it might be said that this usage, even if proved in fact, is bad in law as being unreasonable, oppressive, or uncertain. If the term of the contract set out in the case is not valid, then the contract, so far as it is set out in the case, makes no provision for the event which has happened. But the employer has availed himself of the workman's labour and taken the cloth and doubtless sold it. That being so, there is an implied promise to pay what is fair and right. The plaintiff's claim on quantum meruit is found in the case. It is 7*s.* 11½*d.* If, then, the alleged usage is good, the plaintiff has been paid in cash the full amount of the wages earned by or payable to her. If the alleged usage is bad, she has been paid in cash 6*d.* more than the full amount of the wages earned by her. The plaintiff had, therefore, no cause of action against the defendants at common law. The defendants, also, had no cause of action against the plaintiff. Even if the bad work was a breach of the contract (which I doubt, seeing that the contract provided for it), the defendants sustained no damage thereby, because they paid a reduced sum for the work, a sum fixed by themselves. The counterclaim should have been dismissed.

Then, is there anything in the Truck Act, 1831, to give the plaintiff a cause of action for 6*d.* more than she has been paid, although she has no right to it at common law? That Act deals mainly with payment in kind. So far as it deals with non-payment and deduction and set-off it deals with two matters—the right of the employer to satisfy a cross-claim by deduction from wages earned and the right of the employer to satisfy his cross-claim by set-off in the workman's action for wages. There are three cases: First, where the cross-claim is permitted by the Act (ss. 23 and 24). Here the employer may deduct from the wages earned. In this case, the wages payable are less than the wages earned. Secondly, where the cross-claim is for a matter forbidden by the Act (ss. 5 and 6). Here the employer can neither deduct from the wages earned nor set-off against an action for wages. Indeed, by s. 6, the cause of action is destroyed altogether. Thirdly, where the cross-claim is for a matter neither permitted nor forbidden by the Act. Here the employer cannot deduct from wages earned. He must pay them in full, although it is more than he owes the workman. But he can set-off his claim in an action by the workman for wages unpaid. *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1), was a case of this class. The employer had a claim for money due from the workman under a judgment. It was held illegal to deduct it from the wages earned, but it was admitted that the workman's action for the unpaid balance of wages earned must fail, because the set-off was good.

If the view I have taken of the contract of employment is correct, the Truck Act, 1831, has no application. Sect. 3 requires that the entire amount of the wages earned by or payable to the plaintiff shall be paid to her in coin. The amount of wages payable may, in some cases, be less than the amount of wages earned—it can never be more. Here the amount of wages earned by and payable to the plaintiff was, in one view, 7*s.* 11½*d.*, in another view, 8*s.* 5½*d.* The employer did not deduct anything, and had no right to

(1) [1906] A. C. 136.

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deduct anything, from the wages earned by the workman. He made a deduction (or subtraction or abatement) from the standard list; he made no deduction from the wages earned.

I think the matter can be tested by considering what the position would have been if this had been a case of the second instead of being a case of the third class which the contract provides for—if the work of the workman had been good and the material provided by the employer had been bad. The workman would have been entitled to a sum in excess of the standard list. Supposing a sum of 2*s.* had been found in the case as being a proper addition, I do not think it could be denied that the sum of 10*s.* 11½*d.* would have been the amount of the wages earned by and payable to the workman. If the wages arrived at by a proper addition to the standard list are the wages earned by the workman, it seems to me to follow that the wages arrived at by a proper deduction from the standard list are also the wages earned by and payable to the workman. I agree with the direction which Avory J. has indicated.

Appeal allowed.

Solicitors for appellants: *Rawle, Johnstone & Co., for John Taylor & Co., Manchester and Blackburn.*

Solicitors for respondent: *Patersons, Snow & Co., for Fielding & Fernihough, Bolton.*

F. C.

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Dec. 8, 9, 20.

Restraint of Trade—Contract of Service—Severability of Covenant.

A promise may be enforceable notwithstanding that the promisor has in the same document made promises, supported by the same consideration, which are void, provided that the severed parts are independent and that not the kind but only the extent of the promisor's obligations will be changed by the partial enforcement. Agreements in restraint of trade form no exception to this rule.

The defendant was employed by the plaintiff, a tailor carrying on business at three places, A, B and C in Birmingham, as manager and cutter. The defendant, in consideration of the employment, promised that on the determination of his agreement he would not for five years (1.) set up as a tailor himself (2.) enter into the employment of a named neighbouring trade rival (3.) be employed in any capacity with any tailor carrying on business in A or B or C :—

Held, that the promise not to take service with any tailor in A could be severed from the other promises and enforced, in that it did not affect the original effect and meaning of the agreement—namely, to protect the plaintiff against an improper use by the defendant of the knowledge which he had acquired in the plaintiff's service—but only limited the scope of its operation.

Mallan v. *May* (1843) 11 M. & W. 653 and *Attwood* v. *Lamont* [1920] 3 K. B. 571 applied.

Appeal from Birmingham County Court.

The following statement of facts is taken from the written judgment of Salter J. :—

The plaintiff is a tailor carrying on business in Birmingham at three places—namely, Snow Hill, Bristol Road and Aston Cross. The defendant was formerly in the employ of Dresdens, a brother in law of the plaintiff, who carries on business as a tailor quite near to the plaintiff, and is a trade rival. One Joe Putsman, a brother of the plaintiff, also carries on business as a tailor at 73 Snow Hill, and is a trade rival of the plaintiff. The defendant left the employ of Dresdens and entered the service of the plaintiff in March, 1925. The contract of service is in writing, and is dated March 21, 1925. The employment is for twelve months certain, and after that to be terminable by one week's notice on either side. The plaintiff promises to employ the defendant, to pay him 4*l*. a week and a commission, and to allow him

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two weeks' holiday in a year at half wages. The defendant promises to serve the plaintiff as manager and cutter at Snow Hill, "or at such other place or places where the employer's business shall be carried on and as the employer may require," to serve with diligence and fidelity, to keep his employer's secrets, to keep and render accounts, not to compete or to be engaged in any other business during the service, and not to compete after the determination of the service.

The provisions relating to the last named matter are contained in clause 11 of the contract, and are as follows: "After the determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or be employed by Dresdens, tailors, or be employed in any capacity by any person, firm, or company carrying on a business similar to that of the employer in Snow Hill, Birmingham, or within a half mile radius of Aston Cross, Birmingham, or Bristol Road, Birmingham."

Under this contract the defendant managed the plaintiff's business at 49 Snow Hill for fifteen months. On Thursday, June 10, 1926, he went to the plaintiff's brother, Joe Putsman, and arranged with him to leave the plaintiff's service and enter that of Joe Putsman on the following Monday. On Saturday, June 12, the defendant paid the plaintiff 4*l.* in lieu of notice and left his service. On the Monday he entered the service of Joe Putsman, who exhibited a photograph of the defendant in his shop window with a notice that he had secured the defendant's services. The plaintiff took proceedings in the county court and prayed an injunction in the terms of clause 11. He further submitted that, if clause 11 should be held to be too wide to be enforceable as a whole, he was entitled to an injunction restraining the defendant for a period of five years from the determination of the agreement from being employed in Snow Hill, Birmingham, in any capacity by any person, firm, or company in a business similar to that of the plaintiff.

The county court judge refused to grant the injunction. The plaintiff appealed.

R. A. Willes for the plaintiff.

C. R. Williams for the defendant.

Cur. adv. vult.

1926. Dec. 20. The following judgments were read:—

SALTER J. This is an appeal by the plaintiff from the refusal of the county court judge to grant an injunction restraining the defendant, his former servant, from competing in business with him after the termination of the service. [His Lordship set out the facts as stated and continued:] The learned judge evidently rejected the claim to an injunction in the terms of the whole clause. He held that the promise not to take service for five years with any tailor in Snow Hill was a promise which might properly be enforced as a separate promise, if it were a valid promise, but he held that such a promise was invalid as being in undue restraint of trade.

In view of the opinion which I have formed, it is unnecessary for me to consider the validity of clause 11 as a whole, and it is, therefore, unnecessary to consider its meaning and to decide, for example, whether there is any limit in space to the promises not to set up in business for himself and not to enter the employ of Dresdens. I confine my judgment to the questions of severability, and the validity of the promise not to take service with any tailor in Snow Hill for five years.

The doctrine of severability is not confined to contracts of service, nor to contracts in restraint of trade. If a promisee claims the enforcement of a promise, and the promise is a valid promise and supported by consideration, the Court will enforce the promise, notwithstanding the fact that the promisor has made other promises, supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid, as being in undue restraint of trade or for any other reason, the Court will not invent

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a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made, but did not make. The promise to be enforceable must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the Court will enforce it. Whether it is separate or not depends on the language of the document. Severance, as it seems to me, is the act of the parties, not of the Court.

Some of the judgments in the House of Lords in *Mason* v. *Provident Clothing and Supply Co., Ld.* (1), and the judgment of Younger L.J. in *Attwood* v. *Lamont* (2), appear to suggest that some of the earlier decisions on severance are no longer reliable guides. A definite test to be applied in determining, on the construction of an agreement, whether a particular promise contained in it is separately enforceable or not, is contained in the judgment of Lord Sterndale in the last named case. (3) In that case (the converse of the present) the agreement was that the defendant would not engage in any one of many branches of business in one place. Lord Sterndale said (3): "The doctrine of severability has been much criticized by Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (4) and by Neville J. in *Goldsoll* v. *Goldman.* (5) These criticisms, however, were not accepted by the Court of Appeal: see Kennedy L.J. in *Goldsoll* v. *Goldman* (6), or by Sargant J. in *Nevanas & Co.* v. *Walker.* (7) I think, therefore, that it is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining." Again (8): "It remains, therefore, to consider whether the covenant in this agreement can be

(1) [1913] A. C. 724.
(2) [1920] 3 K. B. 571, 581.
(3) Ibid. 577.
(4) [1913] A. C. 724, 745.
(5) [1914] 2 Ch. 603, 613.
(6) [1915] 1 Ch. 292, 299.
(7) [1914] 1 Ch. 413, 422.
(8) [1920] 3 K. B. 578.

considered as though it contained a number of several covenants each relating to a separate trade. I think it clear that if the severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, the different parts of it cannot be said to be independent." Lastly (1): "I think it is necessary to examine the meaning of the agreement as unsevered in order to see whether it complies with the principles above stated, and then to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operations."

Applying this test to the present case, the defendant has made many promises which are obviously separate. If clause 11 were held to be indivisible and wholly bad, the master could enforce the promises to be diligent, to account, and not to compete during the service. Turning to clause 11, the defendant promises, in consideration of the agreed employment, that for five years he will not: (1.) set up as a tailor for himself; (2.) take service with Dresdens; (3.) take service with any tailor in Snow Hill; (4.) take service with any tailor in the Bristol Road area; (5.) take service with any tailor in the Aston Cross area. If the first, second, fourth and fifth of these promises are ignored and clause 11 is treated as though it comprised only the third, does the change give to the agreement as a whole "a meaning and object different in kind and not only in extent" (2)? We have "to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operations." (1) In my opinion, the change is a change in extent only and not in kind, and the promise not to take service in Snow Hill is separately enforceable.

The remaining question is the validity of this promise. The relation between master and servant is always confidential, though in differing degrees. The relation between a master and the servant who manages his business for him is highly confidential. During the service he is in constant contact with the master's customers, and cannot fail to learn their names and addresses, their likes and dislikes, and something

(1) [1920] 3 K. B. 579. (2) [1920] 3 K. B. 578.

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of their financial credit. Such knowledge can be used with effect, after the determination of the service, to induce such customers to transfer their custom to a new employer. Certain conduct of this kind will be restrained, as being in breach of implied terms in the contract of service: *Robb* v. *Green* (1) and *Louis* v. *Smellie*. (2) Other conduct of this kind, though injurious to the late employer, will not be restrained in the absence of express agreement. Such agreement need not take the form of a covenant against solicitation. Such a covenant is difficult to enforce; it is difficult to show breach and difficult to frame an injunction. The master is entitled to protect himself by a covenant against competition, provided that it is not wider than is reasonably necessary to safeguard his proprietary interest against unfair use by the former servant of information gained during the service: see the judgment of Lord Sterndale M.R. in *Attwood* v. *Lamont*. (3) The question whether a covenant in restraint of trade is unduly wide, though depending on questions of fact, is always treated as a matter of law. The limits in time and space, the nature and agreed duration of the employment, and all the circumstances must be considered together, the onus being on the employer to show that the covenant is not too wide. Here the employment was highly confidential, the service was for twelve months at least, and the limit in space is, in my opinion, very narrow indeed. Seeing that the defendant could solicit the plaintiff's customers from the next street, I think that a limit of five years is not too long. I am, therefore, unable to agree with the learned judge on this point. Moreover, he has applied a wrong test in considering whether the scope of the promise is, or is not, too wide. After quoting at length from the judgments in *Attwood* v. *Lamont* (4), and laying down the right principle, he gives as his reason, and apparently his only reason, for holding the covenant to be too wide, that the defendant had acquired no knowledge of the plaintiff's customers during his fifteen months' management of the plaintiff's business,

(1) [1895] 2 Q. B. 315.
(2) (1895) 11 Times L. R. 515.
(3) [1920] 3 K. B. 578.
(4) Ibid. 571.

and was not, therefore, at the end of the service in a position to do any injury to the plaintiff's goodwill. This seems to me not only incredible in fact, but unsound in law. The question is not whether experience gained during the service has shown the restriction to have been excessive or insufficient. The question is whether the covenant was a reasonable one for the parties to agree to at the outset of the service on the best estimate which they could then make of the future. If, for example, a long service as manager was contemplated as probable, and it proves in fact to be short, it may appear that a narrower restriction would have been sufficient. If, on the other hand, a short service was contemplated, and it proves to be a long one, it may well be that if the parties could have foreseen the future they would have agreed on a wider covenant.

For these reasons I think that the appeal succeeds. The judgment for the defendant and the order for an inquiry as to damages must be set aside and judgment must be entered for the plaintiff for an injunction restraining the defendant for a period of five years from the determination of the agreement from being employed in Snow Hill, Birmingham, in any capacity by any person, firm, or company carrying on a business similar to that of the plaintiff.

TALBOT J. I need not read the material clause of the agreement again. The learned county court judge has held that it contains a separate severable contract not to be employed for five years from the determination of the agreement in any capacity by any person, firm, or company carrying on a business similar to the plaintiff's in Snow Hill. He has held that this contract is illegal as being in restraint of trade.

The first question is whether this contract is severable as held by the learned judge. I know of no ground for saying that the law in this respect is not precisely the same as to contracts illegal as being in restraint of trade and contracts illegal in any other respect. It is thus stated by Willes J. in *Pickering* v. *Ilfracombe Ry. Co.* (1): "Where you cannot

(1) (1868) L. R. 3 C. P. 235, 250.

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sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." The contract in the present case is (among other things) not to enter employment of a particular kind in either of three defined areas. Why is not that severable into three contracts each binding the defendant not to enter such employment in one of the three? It is difficult to see how, if any such contract is severable, this is not. There is, however, direct authority on this point. In *Mallan* v. *May* (1) there was a covenant that the defendant would not practise as a dentist as principal or assistant in London or any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising before a certain time. The Court held that the covenant as a whole was unreasonable and illegal, but that if confined to London it was good. Parke B., in delivering the judgment of the Court, said (2): "We think that the stipulation as to not practising in London is valid, and is not affected by the illegality of the other part. That question was decided in *Chesman* v. *Nainby*." (3) *Chesman* v. *Nainby* (3) was decided in 1726 first by the Court of Common Pleas, then by the King's Bench, on error, and lastly by the House of Lords, in accordance with the unanimous opinion of all the judges.

The law, therefore, as declared in *Mallan* v. *May* (1), has been recognized for at least 200 years. The case is of the highest authority and it is directly in point. A principle governing all contracts impugned on the ground of illegality is there applied to a contract exactly similar in essentials to that in question in the present case—namely, that a man is not the less bound by a legal contract because he has at the same time made a contract which is illegal, the only question in each case being whether the legal and the illegal can be severed. I should feel no difficulty about this part

(1) 11 M. & W. 653. (2) 11 M. & W. 669.
(3) (1726) 2 Str. 739.

of the case but for the judgment of Younger L.J. in *Attwood* v. *Lamont.* (1) It seems to be there suggested that the fact that it is now settled that on the question of the validity of a contract in restraint of trade the burthen is on those who assert and not on those who deny its validity has made inapplicable to contracts of this kind the general rule of law as to contracts alleged to be illegal and has introduced some other rule. Speaking with great respect, I cannot see how the question whether a contract is severable can be affected by the burthen of proof on the question whether the contract as severed is legal. You have first to see whether there is a severable contract, and, if there is, the plaintiff has then to show that it is legal as not going beyond what is reasonable. The two questions appear to me to be entirely independent. The suggestion of Younger L.J. seems to be based principally on the judgment of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (2) The judgment must be read in connection with the facts of the case before the House. It cannot have been intended to overrule the authorities which (as was said by Kennedy L.J. in *Goldsoll* v. *Goldman* (3), after referring to Lord Moulton's words in *Mason's* case (2)), have established that "if words are used in a covenant such as admit of severability by mentioning different areas, we must sever the covenant so as to limit its operation to an area which is not too large." In *Mason's* case (4) there was an agreement not to be employed within three years from the termination of a service terminable by a fortnight's notice within twenty-five miles of London or twenty-five miles of any place where Mason should have been employed by the company during the agreement. The House of Lords considered that the twenty-five miles radius, whether applied to London or to other places, was unreasonable and illegal, and the language of Lord Moulton will be seen from its terms to refer to the suggestion that it was the duty of a Court to pick out from this unreasonably wide agreement something not expressed which if expressed might have been not

(1) [1920] 3 K. B. 593.
(2) [1913] A. C. 745.
(3) [1915] 1 Ch. 299.
(4) [1913] A. C. 724.

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unreasonable. This is plainly inapplicable to a contract not to trade in either of three defined areas, which is indeed on the face of it the equivalent of three contracts each referring to one of the areas; and Lord Shaw draws this very distinction (1): "There is," he says, "no occasion for the framing, in the present instance, of a limited injunction, the contract not being in separate and clearly defined divisions." The same view of Lord Moulton's judgment was taken by Sargant L.J., when a judge of the Chancery Division, in *Nevanas & Co.* v. *Walker*. (2) He said: "Here I may clear the ground at once from a suggestion that, in view of certain remarks of Lord Moulton in the recent case of *Mason* v. *Provident Clothing and Supply Co.* (3), this part of the covenant is invalidated, because the succeeding part of the covenant—namely, that prohibiting the carrying on by the manager of any trade or business similar to any trade or business carried on during the period of his employment by the company is, admittedly, too wide. I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants. No question of the kind was involved in the case before the House of Lords, and I think that Lord Moulton was not intending to deal with the numerous cases of high authority in which the good part of such a covenant was held to be enforceable, notwithstanding its collocation with a bad part, but was only thinking of those cases in which some severance has been effected by the Court, and the covenant has not been held bad merely because it might work unreasonably in certain exceptional circumstances not within its main and principal purpose and meaning." This passage was approved by Lord Sterndale in *Attwood* v. *Lamont* (4) and he states the law thus (5): "It is still the law that a contract can be severed if the severed parts are independent of one

(1) [1913] A. C. 742.
(2) [1914] 1 Ch. 422.
(3) [1913] A. C. 745.
(4) [1920] 3 K. B. 593.
(5) [1920] 3 K. B. 577.

another and can be severed without the severance affecting the meaning of the part remaining." I should add that in *British Reinforced Concrete Co.* v. *Schelff* (1), a case later than *Attwood* v. *Lamont* (2), Younger L.J. appears to treat a contract as generally speaking severable where it relates to a distinct area. It seems to me, therefore, that we are bound to apply to this agreement the law applicable to contracts generally as it has always been understood. So applying it, I am clearly of opinion that the agreement contains a distinct and severable contract, as found by the learned judge, not to be employed in the business mentioned in Snow Hill.

It was argued for the respondent, on the authority of *British Reinforced Concrete Co.* v. *Schelff* (1), that the contract not to be employed as a servant could not be severed from the contract not to carry on business, and that the contract not to carry on business being unrestricted in point of space was illegal. In my opinion, the case relied on did not, and indeed could not, lay down any such general rule as was suggested. The contract there was very different from that in the present case, and the decision that it was not severable clearly does not make the contract now sued on not severable. Moreover, I am of opinion that on the true construction of this agreement the contract not to carry on business is limited in space to the three areas specified. No doubt the words are capable of the other construction, but, if they are to be treated as ambiguous, it is right to give them the more limited of the possible meanings. The principle also applies that if an instrument is reasonably capable of two constructions that which does not involve illegality is to be preferred to that which does. In any case, my opinion that the learned judge was right in severing the contract as he has severed it would not be affected if I took a different view of the meaning of the earlier part of the clause than that which I have expressed.

The question then is whether the contract as so severed is valid. On this I have very little to add to the judgment which has been delivered. I think that the result of the

(1) [1921] 2 Ch. 563. (2) [1920] 3 K. B. 571.

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authorities is that stated by Lord Sterndale M.R. in *Attwood* v. *Lamont* (1)—namely, that though in a contract such as this the restraint can only be justified so far as it is necessary to protect the employer "against an improper use by the servant of the knowledge which he has acquired in the master's service" yet this restraint may take the form not of forbidding such improper use but of restraining the servant generally from trading in a certain area. In other words, the employer is entitled to make himself reasonably safe against abuse of his confidence without the necessity of proving definitely that the servant has actually taken, or is threatening to take, unfair advantage of what he has learned in his service. In this case it is, in my opinion, sufficiently evident from the nature of the defendant's employment, and all the circumstances, that for the defendant to enter the service of a rival trader in the same street necessarily exposes the plaintiff to unfairness against which he is entitled to protect himself. This establishes the reasonableness and the legality of the contract, and I think that the learned county court judge was mistaken in thinking that any further evidence was necessary to support the plaintiff's case.

I agree, therefore, that the plaintiff should have had judgment and that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Sharpe, Pritchard & Co., for James, Barton & Kentish, Birmingham.*

Solicitors for defendant: *Stibbard, Gibson & Co.*

(1) [1920] 2 K. B. 578.

W. L. L. B.

BEHNKE *v.* BEDE SHIPPING COMPANY, LIMITED.

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Jan. 12, 13, 14, 18.

[1926. B. 5382.]

Sale of Goods—Ship—Note or Memorandum in Writing signed by Person to be charged—Specific Performance of Contract for Sale of Ship—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 4, 52, 62.

A ship comes within the definition of "goods" in s. 62 of the Sale of Goods Act, 1893, and therefore a contract for the sale of a ship must, in order to be valid, comply with the requirements of s. 4 of the Act.

Under s. 52 of the Sale of Goods Act the Court may, if it thinks fit, order specific performance of a contract for the sale of a ship.

ACTION tried before Wright J.

The plaintiff, a German shipowner, brought an action against the defendants, the owners of the British steamship *City*, claiming a declaration that he purchased the *City* by contract from the defendants, and an order for specific performance of that contract, an injunction restraining the defendants from parting with the steamship to any one but himself, and, in the alternative, damages for breach of contract.

The defendants denied the contract, and in the alternative said that if they entered into the contract it was not enforceable by reason of s. 4 of the Sale of Goods Act, 1893. They also said that in any event it was not a case in which specific performance ought to be decreed.

The facts are fully stated in the judgment and are summarized below.

The negotiations between the plaintiff and defendants were conducted through the intermediation of Mr. Sloan, of Sloan & Jackson, Ld., a firm of brokers at Glasgow. The plaintiff, who was at Rostock, communicated by letter and telegram with Mr. Sloan, who in turn communicated with the plaintiff in the same manner. Mr. Frew, on behalf of the defendants, whose office was at Newcastle-upon-Tyne, spoke on the telephone with Mr. Sloan, and letters and telegrams passed between them.

On November 17, 1926, the plaintiff wrote to the brokers with a firm offer of 7650*l.* for the *City*, but he made it a

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condition that the design of the boilers should be such as to satisfy the German boiler authorities. The *City* was an old vessel, having been built in 1892, but her engines and boilers were practically new and such as to satisfy the German regulations, and the plaintiff could, as a German shipowner, have her at once put on the German register. This vessel was of peculiar value to the plaintiff having regard to these facts and to her price. There was evidence that only one steamer was on the market which would suit the plaintiff's requirements, and that vessel might now be sold. On November 19 the brokers, after a long conversation with the defendants, wrote in reply that the business might be considered as a fixed sale subject to the boilers being in accordance with the German requirements. The German authorities, having been satisfied with the design and plan of the boilers submitted to them, the plaintiff telegraphed to the brokers on November 26 to send the contract of sale.

On November 19, 1926, the brokers drew up and sent a pro forma contract to the defendants for them to amend. The defendants replied with various suggestions which the brokers embodied in the contract. They then sent the altered contract to the defendants again for their approval. On November 24 the defendants, having made various amendments in the contract, returned it to the brokers. The contract was headed with the defendants' name as sellers. It provided that a deposit of 1500*l.* should be paid, and also contained clauses which provided that before completion and payment of the balance of the purchase price the buyer was to have the option of inspecting the vessel afloat and of requiring the sellers to place her in dry dock for inspection and of requiring the sellers to repair certain damage, if any were found. On Thursday, November 25, the defendants telegraphed to the brokers that they could not allow later than noon Saturday for definite acceptance of steamer on terms of contract, and they confirmed this by letter. Mr. Frew eventually said he would do nothing till Monday. Mr. Sloan on November 25 sent a copy of the contract to the plaintiff with a letter that he was only allowed

till Saturday to say whether he accepted the steamer on the enclosed form of contract. At this time the defendants were in negotiation with other buyers for the sale of the *City*. On Monday, November 29, Mr. Sloan had a telephone conversation with Mr. Frew, and immediately afterwards sent a telegram to the plaintiff that the owners must have telegraphic acceptance of the contract before 4 P.M. on that day. His Lordship held that that telegram was sent by Mr. Sloan with the authority of Mr. Frew. The plaintiff, immediately on receipt of the telegram, wired accepting the contract, and on the same day sent by post the contract duly signed and a cheque for the deposit of 1500*l*. Mr. Sloan passed on to Mr. Frew by telephone about 2.50 P.M. the contents of the telegram. Mr. Frew had in the meantime arranged to sell the steamer to other buyers, and he sought to revoke his offer to the plaintiff, but the revocation did not reach the plaintiff before the plaintiff sent off his acceptance. The defendants refused to give any instructions as regards the deposit, and repudiated any contract with the plaintiff, who thereupon commenced this action.

Langton K.C. and *Carpmael* for the plaintiff. On the evidence there was a concluded contract between the plaintiff and the defendants for the purchase of the *City*. Letters can constitute a binding contract, even although they contemplate the preparation and execution in the future of a formal contract: *Lewis* v. *Brass* (1); *Bonnewell* v. *Jenkins*. (2) In the latter case *Rossiter* v. *Miller* (3) was distinguished.

This contract can be enforced by an order for specific performance. Such an order will be made for the delivery of a chattel of unique value: see Fry on Specific Performance, 6th ed., p. 36. A ship is a chattel of unique value: Halsbury's Laws of England, vol. xxvii., p. 14, note (*g*). Specific performance of a contract for the sale of a barge was decreed in *Claringbould* v. *Curtis* (4) in spite of the fact that the vendor had transferred the barge to a third party nearly

(1) (1877) 3 Q. B. D. 667.
(2) (1878) 8 Ch. D. 70.
(3) (1877) 5 Ch. D. 648.
(4) (1852) 21 L. J. (Ch.) 541.

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a year before the date of the contract sued on. In *Hart* v. *Herwig* (1) Mellish L.J. said with reference to a contract between a German and an Englishman for the sale and purchase of a German ship: "I am clearly of opinion that we are not in the least degree infringing any rule of the law of nations by saying that this Court, which is the only Court which can compel the actual specific performance of the contract, has jurisdiction in this case. It is peculiarly a case for the interference of this Court, inasmuch as if specific performance were denied to the plaintiff he, practically, would get no justice at all, because it would be almost impossible for him to prove in Hamburg how much the ship was worth, and practically to make out that she was damaged at all. In fact he has entered into this contract for the purchase of the ship, and he is entitled to the ship." The Court there definitely expressed the view not only that specific performance of a contract for the sale of a ship could be decreed, but also that it was the most appropriate remedy even where the ship was a foreign ship.

Under the Sale of Goods Act, 1893, s. 52, the Court may direct specific performance of a contract to deliver "specific or ascertained goods." The expression "goods" is defined in s. 62 as including "all chattels personal other than things in action and money." A ship is clearly a chattel personal: see Chalmers' Sale of Goods, 10th ed., p. 150. The Court can order specific performance of a contract for the sale of ascertained goods, whether or not the property has passed by the contract: per Parker J. in *James Jones & Sons, Ld.* v. *Earl of Tankerville* (2); see also *In re Wait.* (3)

A. T. Miller K.C. and *Sir Robert Aske* for the defendants. There was no concluded contract in the present case because there was no part payment of the purchase price, nor was there any note or memorandum in writing signed by the party to be charged, and therefore the requirements of s. 4 of the Sale of Goods Act, 1893, have not been complied with. Mr. Sloan was not the defendants' agent to sign the contract

(1) (1873) L. R. 8 Ch. 860, 866. (2) [1909] 2 Ch. 440, 445.
(3) [1926] Ch. 962.

on their behalf; he occupied the position of a broker who was earning a commission for himself. There is considerable doubt whether a ship comes under the denomination of "goods" for the purpose of the Sale of Goods Act, having regard to the fact that it is governed by so many special rules: see Chalmers' Sale of Goods, 10th ed., p. 150. "A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships": per Turner L.J. in *Hooper* v. *Gumm.* (1) If there was a concluded contract between the plaintiff and the defendants for the sale of the ship the remedy for a breach of that contract would be in damages and not by a decree of specific performance. Even if a ship be "goods" within the Sale of Goods Act, 1893, the Court has, under s. 52, a discretion whether it will direct that the contract to deliver specific or ascertained goods shall be performed specifically. There is no case in which specific performance of a contract for the sale of a ship has been ordered. The power of the Court under s. 52 to decree specific performance only arises where the defendant wishes to retain the goods for himself. Further, this is not the case of a mere contract for the sale of a specific chattel, inasmuch as it contains special provision with regard to dry docking the ship and doing repairs to her if necessary. The Court will not enforce a contract to do work and render services by a decree of specific performance; a breach of such a contract can be adequately compensated by the awarding of damages.

Langton K.C. in reply. The deposit of 1500*l.* was paid by the plaintiff to Sloan & Jackson, who held it as agents for the sellers. That deposit was held for a day or two and was not immediately returned, and therefore it amounted to a part payment sufficient to satisfy s. 4 of the Sale of Goods Act, 1893: *Parker* v. *Crisp & Co.* (2), where *Davis* v. *Phillips, Mills & Co.* (3) was distinguished. The letters and telegrams which the defendants sent constituted an

(1) (1867) L. R. 2 Ch. 282, 290. (2) [1919] 1 K. B. 481.
(3) (1907) 24 Times L. R. 4.

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unambiguous recognition of the existence of the contract and of its terms, and therefore there was a sufficient memorandum in writing signed by the defendants to satisfy s. 4 of the Sale of Goods Act: *Buxton* v. *Rust.* (1) It is true that there is no case in which it has been held that a ship comes within the Sale of Goods Act, but there are cases in which it has been held that a ship under construction comes within the Act. There is no reason why specific performance of a contract for the sale of a ship should not be decreed, especially where, as in the present case, the ship would be of peculiar value to the buyer. There is no question of the defendants doing work and performing personal services in the present case with regard to the dry docking and repairs of the ship. All that is required is that the defendants should give the necessary orders, and therefore that is no reason for not making the order for specific performance.

Cur. adv. vult.

Jan. 18. WRIGHT J. read the following judgment.

This is an action tried before me on January 12, 1927, without pleadings under an order of the vacation judge dated January 5 last. The plaintiff, a German shipowner, claims against the defendants, the owners of the British steamship *City*, a declaration that he purchased the *City* by contract from the defendants, and an order for specific performance of that contract, and an injunction; and, in the alternative, damages. The defendants deny the contract, and in the alternative say that it is not enforceable by reason of s. 4 of the Sale of Goods Act, 1893; and in any event say that it is not a case in which specific performance ought to be decreed.

The negotiations between the plaintiff and defendants were conducted through the intermediation of a Mr. Sloan, of Sloan & Jackson, Ld. I find that he acted throughout in his capacity of a broker for sale and purchase, and that he was not specifically or peculiarly the agent of either party, with any authority to bind either party or to accept a

(1) (1872) L. R. 7 Ex. 279.

communication for either party. He was in turn the agent of either party "for the purpose of receiving and transmitting propositions": see Storey on Sale, s. 87. This is the true position of such a broker, whose duty and interest are to do his best to bring the parties together. In the events which happened it is important to define this position. Commission would be paid by the sellers out of the gross price. The deposit was to be paid to the brokers as stake holders. The plaintiff, who was at Rostock, communicated by letter or telegram with Mr. Sloan, who, in turn, communicated with the plaintiff in the same manner. Mr. Frew, on behalf of the defendants, whose office was at Newcastle-on-Tyne, spoke on the telephone with Mr. Sloan, who was at Glasgow, and letters and telegrams also passed between them.

On November 17, 1926, the plaintiff wrote to the brokers with a firm offer of 7650*l.* for the *City*, but he made it a condition that the design of the boilers should be such as to satisfy the German boiler authorities; he also stated other conditions. On November 19 the brokers wrote in reply, after a long conversation with the defendants, that the business might be considered as a fixed sale, subject to the boilers being in accordance with German law requirements, and to the adjustment of details and contract. It was contended by Mr. Langton that the contract was complete at that date, subject to the question of the boilers and to the preparation of a formal contract. I decide against this contention. In my judgment the agreement of the precise terms of the contract was no formality, but an essential part of the bargain, so that no contract could be concluded till the terms had been adjusted and agreed between both parties.

On November 27 (a Saturday) the plaintiff, who had obtained the design and plan of the boilers and submitted them to the German authorities, who were satisfied, telegraphed to the brokers: "*City* confirmed, send contracts." Mr. Langton contended that this closed the bargain and concluded the contract. For the same reasons as stated above, I do not accept this contention. The final stage—namely, the submitting of the contract by the defendants

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as sellers, and its approval by the plaintiff as buyer—was still not reached.

The preparation of the contract had been proceeding. On November 19 the brokers, after telephone conversation with the defendants, wrote to them enclosing a pro forma contract for the defendants to amend, so that a clean copy could be drafted and sent to Rostock. The defendants replied with various suggestions, all of substance, such as amount of deposit, inspection, etc., and on November 23 the brokers, having sought to embody these suggestions in a clean draft, sent it by letter to the defendants for their approval. On November 24 the defendants, having made various amendments, returned it to the brokers. On the following day they telegraphed to the brokers referring to the doubt that the German authorities would pass the boilers, and added: "We cannot allow later than noon, Saturday, for definite acceptance of steamer on terms of contract posted yesterday." They confirmed this by letter. Mr. Sloan, on receipt of this telegram, telephoned and spoke to Mr. Frew, pointing out that the contract could not reach the plaintiff till Saturday afternoon, and suggested further time, say, till Monday afternoon. There was some dispute in evidence as to what was actually said. I find that Mr. Frew said he would do nothing till Monday, and suggested the contract should be sent by air mail, as indeed it was sent by Mr. Sloan. The reason of Mr. Frew's urgency was that another set of brokers, Wait & Dodds, had approached him with offers from another buyer, which were not indeed at that stage very satisfactory. Mr. Sloan sent a clean copy of the contract as altered by Mr. Frew to the plaintiff, with a letter saying that he was only allowed till Saturday to say whether he accepted the steamer on the enclosed form of contract. He also sent another copy of the contract to the defendants.

On the same day Wait & Dodds wrote offering on behalf of their clients to buy the steamer for 8000*l.*, payment by certain instalments, or 7700*l.* cash; and the defendants replied that a meeting of directors would be held on the Monday, November 29.

The plaintiff did not receive the brokers' letter sent on November 25 till the morning of Sunday, November 28. Having regard to the early date fixed for the trial he was not present at the trial, but there is no ground for suggesting that he was not anxious to buy the steamer if the boilers would satisfy the German authorities, and he wired on November 26, as already stated, as soon as he ascertained that fact. He may have been puzzled to receive on the Sunday a letter limiting his time to reply to the previous Saturday, and seems to have waited till the Monday to hear further. The position on the Monday morning, November 29, was that the offer, whether open for Saturday or up to noon Saturday, had lapsed. About 10.30 A.M. Mr. Sloan spoke to Mr. Frew on the telephone, and told him of the telegram from the plaintiff. "*City* confirmed, send contracts." Mr. Frew was willing to close with the plaintiff if it appeared that the plaintiff accepted the contract sent him, but it was obvious he had not received it. What was said at the conversation is disputed, and I have to decide what version to accept. I have seen both Mr. Sloan and Mr. Frew in the witness box, and I am satisfied I ought to prefer the evidence of Mr. Sloan. I do not question the honesty of either witness, but Mr. Sloan appears to me to be more accurate and precise in recollection. Immediately after the interview he sent a telegram to the plaintiff: "Owners must have your telegraphic acceptance of contract sent our letter 25th before 4 o'clock to-day otherwise will accept an offer by others who are waiting your reply telegraph instantly whether you agree contract which please sign and post to-day sure to us along with deposit." The telegram was signed with the brokers' telegraphic name. I find that that telegram was dispatched by Mr. Sloan with the authority of Mr. Frew given on the telephone. Mr. Frew denies that he gave any such authority, but apart from the personal impression I have formed of the two witnesses, I cannot think that so careful a person as Mr. Sloan would have sent such a telegram without clear authority to do so. The telegram reached the plaintiff at 1.40 P.M. German time, and he at once sent in

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reply the following telegram to Mr. Sloan: "*City* accepted contract deposit posted," and he in fact the same day sent by post the contract signed and a cheque for the deposit of 1500*l.* Mr. Sloan passed on to Mr. Frew by telephone, about 2.50 P.M., the contents of the telegram. I hold that the contract was thereby concluded. I do not think that this result is affected by certain intervening circumstances. Mr. Frew saw Mr. Dodds at 11 A.M., just before his directors' meeting, and after the directors' meeting informed Mr. Dodds (about 11.30) that he could have till 3 P.M. to conclude the purchase of the *City* on the proposed cash basis. At the same time he telegraphed to Mr. Sloan that as other buyers were insisting on immediate reply therefore negotiations with the plaintiff must be subject to steamer being free. The latter phrase means, I think, that the steamer must not be under firm offer elsewhere. Mr. Sloan at once telegraphed this to the plaintiff and at the same time telegraphed in reply to Mr. Frew, protesting that he was entitled to 4 o'clock as arranged. Mr. Frew, I think, realized, after the firm offer was given to Mr. Dodds, that he had put himself in a difficult position, and sought to revoke his offer to the plaintiff, as he might have done if the revocation had reached the plaintiff before the plaintiff sent off his acceptance. It did not, however, do so. Having regard to the view I have expressed as to the position of the brokers, it seems to me, upon well known principles applying to contracts by correspondence, that the revocation did not affect the plaintiff till it actually reached him, whereas his acceptance was effective when it was dispatched. Mr. Dodds, for the other buyers, accepted the firm offer before 3 P.M. Some excited and strained passages occurred on the telephone between Mr. Sloan and Mr. Frew. There was still in law no contract between the other buyers and the defendants, because various terms of the contract had to be settled, but this was done a few days later. The defendants refused to give any instructions as regards the deposit of 1500*l.* received by Mr. Sloan for the plaintiff, and repudiated any contract with the plaintiff, who on December 24 last issued the writ in this action.

I have found that a contract for the sale and purchase of the *City* was concluded between the defendants and the plaintiff, but it is contended that it is not enforceable by reason of s. 4 of the Sale of Goods Act, 1893. It is curious that it has not been decided whether a ship comes within the description of "goods" under that section. Sect. 62 of the Act defines "goods" as "all chattels personal other than things in action and money." A ship is clearly a chattel personal. It is true that some provisions of the Act do not apply to it, e.g., the rule as to market overt. A British ship is also a chattel which is subject to special rules as to registration and transfer under the Merchant Shipping Act, though a British ship sold to a foreigner would come in a different category. But s. 4 of the Act relates to the antecedent contract, not the actual transfer, and ought logically to apply to so valuable a chattel as a ship. A contract for the building of a ship was held by Romer J. to be a contract for the sale of goods within the Act in the case of *In re Blyth Shipbuilding and Dry Docks Co.* (1): compare *Sir James Laing & Sons, Ld.* v. *Barclay, Curle & Co.* (2) I am of opinion that s. 4 of the Act applies, and so decide.

Mr. Langton contended that the section was satisfied by the payment of the deposit which was sent by the plaintiff to the brokers. But to constitute part payment not only must the money be sent by the buyer, but it must also be either accepted or in some way acknowledged by the sellers so as to constitute a recognition by the sellers that there is a contract: *Davis* v. *Phillips, Mills & Co.* (3); *Parker* v. *Crisp & Co.* (4) The contract here provided that the deposit was to be held by the brokers pending completion of the contract; hence the brokers received it, not as agents for the defendants, but as stakeholders, and the defendants expressly declined to give any instructions with reference to it. I hold there was no part payment within the section.

But I am of opinion and decide that there was such a note or memorandum in writing of the contract as the

(1) [1926] Ch. 494.
(2) [1908] A. C. 35.
(3) 24 Times L. R. 4.
(4) [1919] 1 K. B. 481.

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statute requires. The form of contract which the defendants altered in order that it (or a clean copy) should be sent to the plaintiff as the final offer for his acceptance was headed with their name as sellers. They instructed the broker (by letter dated November 25, 1926) to inform the buyer that he must accept the vessel on the terms of the pro forma contract they had prepared or altered: the brokers sent on a copy under these instructions. I think it must be held that either the pro forma contract, so headed and adopted and altered by the defendants, or the letter in terms referring to it as their offer, or both, constitute an offer in writing, which, if accepted either orally or in writing, would constitute as against the sellers a written note or memorandum. But Mr. Miller contended that the offer of November 25 lapsed and is immaterial. I have however found that the first telegram sent to the plaintiff on November 29 was sent with the defendants' authority, and thereby the pro forma contract was redelivered by the defendants and the written offer signed by them was reinstated. The telegram is signed by the brokers, who at this stage in my opinion were the defendants' agents and as such signed the telegram which in terms refers to the pro forma contract. Indeed I think the mere delivery of the pro forma contract, created or recognized by the defendants in the way I have indicated, would constitute delivery of a note or memorandum in writing signed by the defendants. The signature may be constituted by a written or printed heading if adopted or recognized by the party to be charged: *Schneider* v. *Norris* (1) and *Evans* v. *Hoare*. (2) I think the contract is enforceable.

It remains to consider what is the proper remedy. The plaintiff claims a decree of specific performance. This claim is strongly contested on behalf of the defendants. It is curious how little guidance there is on the question whether specific performance should be granted of a contract for the sale of a ship. Sect. 52 of the Sale of Goods Act gives the Court a discretion, if it think fit, in any action for breach of

(1) (1814) 2 M. & S. 286. (2) [1892] 1 Q. B. 593.

contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically. I think a ship is a specific chattel within the Act. In Fry on Specific Performance, 6th ed., p. 37, note 4, it is said a ship is probably within the general principle and reference is made to *Claringbould* v. *Curtis* (1), which, however, is the case of a barge and contains no discussion of principle. *Hart* v. *Herwig* (2) seems to imply that a man who has contracted to purchase a ship is prima facie entitled to have it—that is, by an order for specific performance.

In the present case there is evidence that the *City* was of peculiar and practically unique value to the plaintiff. She was a cheap vessel, being old, having been built in 1892, but her engines and boilers were practically new and such as to satisfy the German regulations, and hence the plaintiff could, as a German shipowner, have her at once put on the German register. A very experienced ship valuer has said that he knew of only one other comparable ship, but that may now have been sold. The plaintiff wants the ship for immediate use, and I do not think damages would be an adequate compensation. I think he is entitled to the ship and a decree of specific performance in order that justice may be done. What is the position between the defendants and the other buyers, whose contract was later in time than that of the plaintiff, is irrelevant in this action.

I have not overlooked the argument of Mr. Miller, based on the clauses in the contract which provide that before completion and payment of the balance of the purchase price the buyer was to have the option of inspecting the vessel afloat and of requiring the sellers to place her in dry dock for inspection, and of requiring the sellers to repair certain damage if any were found. Mr. Miller contended that as the Court will not decree specific performance of a contract to do work or perform services, these clauses constitute a bar to a decree here. But I think this contention is not sound. The defendants are neither dry dockowners nor ship repairers. All they could be required to do would

(1) 21 L. J. (Ch.) 541. (2) L. R. 8 Ch. 860.

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be to give the appropriate orders to a dry dockowner or ship repairer if necessary. But the plaintiff may not require inspection or dry-docking (which, if no damage be found, will be at his own expense), and no damage requiring repairs may be discovered. Thinking, as I do, that justice can only be satisfied by an order for specific performance, I do not find in the clauses referred to, the only ones relied on by Mr. Miller, any ground why I should not make the decree. There will be judgment, therefore, for the plaintiff, with a declaration that he purchased the *City* from the defendants—I do not make the declaration exactly in the terms stated—and a decree that the contract shall be specifically performed, and that an injunction be granted as prayed, and costs.

Judgment for plaintiff.
Decree for specific performance.

Solicitors for plaintiff: *Stokes & Stokes, for Bramwell, Clayton & Clayton, Newcastle-upon-Tyne.*

Solicitors for defendants: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

R. F. S.

BALMFORTH *v.* CHADBURN AND ANOTHER.

1926
Oct. 25.

Rag Flock—"Rags"—Flock made from new and uncontaminated Material—Rag Flock Act, 1911 (1 & 2 *Geo.* 5, *c.* 52), *s.* 1, *sub-s.* 1—*Rag Flock Regulations*, 1912, *art.* 1.

The Rag Flock Act, 1911, s. 1, sub-s. 1, provides that a person shall not sell or have in his possession for sale flock manufactured from rags unless the flock conforms to a standard of cleanliness prescribed by regulations made as therein provided. The Rag Flock Regulations, 1912, made under that Act in relation to flock manufactured from rags provide by art. 1 that flock shall be deemed to conform to the standard of cleanliness for the purposes of the above sub-section when the amount of soluble chlorine in the form of chlorides removed by thorough washing with distilled water at a temperature not exceeding 25 degrees centigrade from not less than 40 grammes of a well mixed sample of flock does not exceed 30 parts of chlorine in 100,000 parts of the flock:—

Held, that the word "rags" in the above provisions is not limited to rags which have become polluted through association with human or animal life, but that it includes flock made from new and uncontaminated material.

Cooper v. *Swift* [1914] 1 K. B. 253 followed and observations explained.

CASE stated by the stipendiary police magistrate for the city of Leeds.

On March 23, 1926, an information was duly laid by one Arthur Balmforth of the public health department of the corporation of the city of Leeds sanitary inspector (hereinafter called "the appellant"), against William Chadburn and John William Chadburn (hereinafter called "the respondents"), for that the respondents on February 17, 1926, in the city of Leeds unlawfully had in their possession for sale certain flock manufactured from rags, which flock did not conform to the standard of cleanliness prescribed by the Rag Flock Regulations, 1912 (1), in that the said flock contained in 100,000 parts 70 parts of soluble chlorine, contrary to the said Regulations and to the Rag Flock Act, 1911. (1) On April 13, 1926, the information was heard

(1) The Rag Flock Act, 1911, provides:—

Sect. 1: "(1.) It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose,

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by the magistrate, and at the hearing it was proved or admitted:—

(*a*) That the appellant was a sanitary inspector of the Leeds Corporation duly authorized to institute and carry on the proceedings.

(*b*) That the respondents jointly carried on the business of manufacturers of rag flock for sale at Tong Road, Leeds.

(*c*) That on February 17, 1926, the appellant visited the premises of the respondents and took a sample of flock, which he divided into two parts and placed in tins, one of which was given to one of the respondents, and the other in sealed condition forwarded to the city analyst.

(*d*) That the rags from which the flock was made consisted of small pieces of new unwashed material, being unused clippings of new cloth.

(*e*) That upon analysis one portion of the rag flock was found to contain 70 parts of soluble chlorine in every 100,000, and the other portion was found to contain 113 parts of chlorine in 100,000.

(*f*) That upon analysis the flock was found to be perfectly clean and free from all impurities, and was, in fact, suitable for the purpose for which it was used.

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unless the flock conforms to such standard of cleanliness as may be prescribed by regulations to be made by the Local Government Board, and, if any person sells or uses or has in his possession flock in contravention of this Act, he shall be liable on summary conviction to a fine not exceeding, in the case of a first offence, ten pounds or in the case of a second or subsequent offence fifty pounds.

"(4.) Where a person is charged with having flock in his possession in contravention of this Act any flock proved in the proceedings to have been found in his possession shall be deemed to be intended for sale or for use in the manufacture of such articles as aforesaid unless the contrary is proved."

The Rag Flock Regulations, 1912, made under the above Act provide (inter alia) that it is expedient that the Regulations thereinafter set forth be made in relation to flock manufactured from rags; and (Art. 1) that:

"Flock shall be deemed to conform to the standard of cleanliness for the purposes of sub-section (1) of Section 1 of the Act when the amount of soluble chlorine, in the form of chlorides, removed by thorough washing with distilled water at a temperature not exceeding 25 degrees centigrade from not less than 40 grammes of a well mixed sample of flock, does not exceed 30 parts of chlorine in 100,000 parts of the flock."

(*g*) That the chlorine test was not a test as to whether flock was dirty or impure or fit to be used.

(*h*) That the said test was merely a test as to whether flock, whether new and clean or not, had in fact been washed.

(*i*) That the additional cost of rewashing new cloth increased the price of flocks from 5*l*. to 7*l*. per ton.

It was contended by the respondents that the flock in question being made from new and uncontaminated material was not flock manufactured from "rags," and therefore did not come within the Act or Regulations; that at the time of the passing of the Act and Regulations the manufacture of flock from new material was unknown to the trade, and that the Act and Regulations could not therefore have been intended to apply to such material; that the Act of 1911 was passed to deal with harmful or contaminated rags—rags worn, soiled or polluted by human contact or otherwise, and possibly of an infectious nature, and that chlorine per se was not injurious or harmful, but that the presence of chlorine in rags of worn clothes, etc., usually denoted the presence of other harmful contamination arising from human contact, urine, or other forms of excretion; that whilst the Act forbade the possession of flock for sale which did not conform to the standard to be prescribed by Regulations, the Regulations did not prescribe a standard required in all cases, but merely prescribed one method by which the flock would be "deemed to conform" to that standard.

It was contended by the appellant that the Regulations prescribed a definite standard of cleanliness, and that any rag flock which when subjected to the test specified in the Regulations was found to contain a proportion of chlorine in excess of the proportion specified in the Regulations, did not conform to the standard of cleanliness prescribed; that although art. 1 of the Regulations was worded in positive terms so as specifically to refer to such flock as "shall be deemed to" conform to the necessary standard of cleanliness, the only reasonable interpretation which could be put on the

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Act and the Regulations was that any flock, which on testing showed results inconsistent with the result specified in the Regulations, did not conform to the standard required by the Act, and that the Regulations were the only Regulations which had been made by the Government department under the Act, and the fact that that department had named only one standard as a test of conformity would appear to justify the assumption that any other rag flock than that which on testing showed a proportion of chlorine not exceeding that stated in the Regulations, should not be deemed to conform to the necessary standard of cleanliness; that the Act and Regulations in no way referred to any other test of cleanliness, and that an informant was not entitled to give, nor was a Court bound to hear, any evidence relating to any other test than that referred to in the Regulations; and that support for the above contentions was contained in the judgments in the case of *Cooper* v. *Swift*. (1)

The magistrate was of opinion that the decision of *Cooper* v. *Swift* (1) being a decision upon totally different facts and upon a specific construction put upon the word "rags" by the magistrate there—namely, that, "'rags' must be either portions of a garment or some material which has been worn or used by a human being or animal, or portions of a material which after being detached have been used in that way," was not a decision binding upon him, and that the said decision must be confined to a case of similar facts where actual pollution was shown on analysis, as he thought appeared from the judgment of Avory J.; that where pollution was shown to exist the Act and Regulations reasonably construed were wide enough to secure a conviction, but that the Regulations did not purport and were not expressed to give an exclusive definition of the standard of cleanliness enacted, but were expressed to define a standard of cleanliness by washing only; that the words in art. 1 of the Regulations: "Flock shall be deemed to conform to the standard of cleanliness for the purposes of the Act when the chlorine removed

(1) [1914] 1 K. B. 253.

by washing does not exceed 30 parts in 100,000," could not logically be read to mean: "No flock shall be deemed to conform to such standard when the chlorine removed by washing exceeds 30 parts in 100,000," and that a legal construction could not be based upon a logical fallacy; that had the Regulations intended to set up the washing test as the exclusive test of cleanliness, clear words to that effect would have been adopted; that the Act and Regulations being penal, must be construed strictly and reasonably, and that the construction sought to be placed upon them by the appellant was neither reasonable nor strict; that whether the word "rags" could or could not include pieces of new clean material clipped from bulk, the Regulations were not intended or expressed to apply to material which being found clean on analysis, did not require washing. The magistrate accordingly dismissed the information.

The question for the opinion of the Court was whether the magistrate was right in law in so doing.

Mortimer K.C. and *F. N. Oldroyd* for the appellant.
Arthur Morley for the respondents.

LORD HEWART C.J. This is a perfectly clear case. It is not necessary to repeat the facts. Sect. 1, sub-s. 1, of the Rag Flock Act, 1911, provides: "It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose, unless the flock conforms to such standard of cleanliness as may be prescribed by Regulations to be made by the Local Government Board." What is the standard of cleanliness to which the flock is to conform and what is conformity to that standard? Art. 1 of the Rag Flock Regulations, 1912, says: "Flock shall be deemed to conform to the standard of cleanliness for the purposes of sub-s. 1 of s. 1 of the Act when the amount of soluble chlorine, in the form of chlorides, removed

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by thorough washing with distilled water at a temperature not exceeding 25 degrees centigrade from not less than 40 grammes of a well mixed sample of flock, does not exceed 30 parts of chlorine in 100,000 parts of the flock." The mere form of that article might suggest, apart from anything else, that one particular standard among various other standards of cleanliness was being laid down. But that article must be read closely in connection with the section of the Act under which it is made. That article of the Regulations being read with the section clearly means that flock shall be deemed to conform to the standard only when it satisfies the test prescribed in the article. The finding of the learned stipendiary magistrate appears to me to be in conflict with the decision of this Court in *Cooper* v. *Swift*. (1) I think it is clear that the learned stipendiary misdirected himself in this case. In my opinion this appeal ought to be allowed, and the case should go back to the magistrate with a direction to convict.

AVORY J. I agree. I only wish to add that, as it appears that some words used by me at the conclusion of my judgment in *Cooper* v. *Swift* (1) have misled the learned stipendiary magistrate in this case, it is well that I should explain my meaning in using these words. I said in my judgment : "An offence is proved to have been committed when it is shown that the flock has been manufactured from rags which are in that state of pollution, however caused, that they do not conform to the standard of cleanliness prescribed by the Regulations." In using there the expression "state of pollution" I was not referring to any active pollution of the material which had taken place, but I was only describing the condition of the material, and it would perhaps have been better if I had used the words "rags which are in that condition, however caused, that they do not conform to the standard of cleanliness prescribed by the Regulations." I observe that my brother Atkin (the present Atkin L.J.), in his judgment also used the expression "the degree of

(1) [1914] 1 K. B. 253.

pollution" in the material; so, if I was in error in using that expression it is some satisfaction to find that he fell into the same error.

SALTER J. I agree.

Appeal allowed. Case remitted.

Solicitor for appellant: *The Town Clerk of Leeds.*
Solicitor for respondents: *Alfred Masser.*

J. R.

[IN THE COURT OF APPEAL.]

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Nov. 17, 18, 19, 22; *Dec.* 17.

REPUBLICA DE GUATEMALA *v.* NUNEZ.

Practice—Interpleader—Appeal—Trial of Issue before Judge without Jury—Leave to appeal—Order LVII., *r.* 11—*Common Law Procedure Act*, 1860 (23 *&* 24 *Vict. c.* 126), *s.* 17—*Appellate Jurisdiction Act*, 1876 (39 *&* 40 *Vict. c.* 59), *s.* 20—*Conflict of Laws—Assignment of Debt—Lex rei sitæ—Lex domicilii.*

Under Order LVII., r. 11, an appeal lies by special leave from the decision of a judge sitting without a jury on the trial of an interpleader issue.

C. being domiciled in Guatemala deposited a sum of money with a bank in London. Subsequently he, being then in Guatemala, assigned in writing by way of gift the money so lying to his credit at the bank to N., who was also domiciled in Guatemala, and written notice of that assignment was given to the bank. It was not disputed that if the effect of that assignment had had to be decided by English law it would have been held good. By the law of Guatemala an assignment of money made without consideration is void, unless made by a document executed before a notary on stamped paper, and signed by both parties; and by the same law an infant cannot accept a voluntary assignment himself, it must be made to and accepted by a legal representative appointed by a judge on the infant's behalf. The assignment was on unstamped paper, was not executed before a notary, and was not signed by N. At the time of the assignment N. was an infant and no legal representative had been appointed. The money lying in the bank having been claimed both by the republic of Guatemala and by N. the bankers interpleaded. In an action to determine the issue between the two claimants:—

Held, that the validity of the assignment to N. must be determined by the law of Guatemala, and was therefore bad:—

By Bankes L.J. upon the ground that, as the republic and N. were both domiciled and resident in Guatemala at the date of their respective assignments, and as the English depositary claimed no interest in the

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fund, the question which, if either, of the two claimants was entitled to it must be determined by the law of their domicil and residence, and not by that of this country.

By Scrutton and Lawrence L.JJ. upon the ground that the question of a person's capacity to take an assignment of personal property is to be governed either by the law of his domicil, or by that of the country where the assignment takes place, and that, as in this case the country of N.'s domicil and that of the assignment to him were the same, it was immaterial to inquire which, had they been different, ought to prevail; but from either point of view N. was incapable, by reason of his infancy, of receiving the donation.

By Scrutton L.J. on the further ground that by reason of non-compliance with the formalities relating to stamp, notary, etc., the assignment was, both by the law of the place where it was made, and by that of the domicil of the parties to it, not merely inadmissible in evidence but void.

Per Lawrence L.J. As the contract of deposit was made in England, and the money was repayable in England where the bank was domiciled, and was recoverable in England, it was an English debt having a local situation in this country, and accordingly the validity of the assignment (as distinguished from that of a contract to assign) must be governed by the lex loci rei sitæ, and not by the law of the country where the assignor and assignee were domiciled, or where the assignment took place. Consequently if non-compliance with the required formalities had been the only objection he would have held the assignment good.

Judgment of Greer J. affirmed.

APPEAL from judgment of Greer J., sitting without a jury. In 1906 Manuel Estrada Cabrera, the then president of the republic of Guatemala, deposited with Messrs. Lazard Bros., bankers of London, a sum of money which with interest amounted by the end of the year 1920 to 21,533*l*. In April, 1920, Cabrera was deposed and imprisoned by his political opponents. Subsequently the money so deposited with Lazard Bros. was claimed on behalf of the republic of Guatemala. Lazard Bros. refused to pay it over, as they had received notice that it was also claimed by one Nunez, an illegitimate son of Cabrera. In October, 1921, an action was commenced on behalf of the republic of Guatemala against Lazard Bros. to recover the money, whereupon the defendants took out an interpleader summons. They were ordered to pay the money into Court, and were dismissed from the action, Nunez being substituted in their place as defendant.

The action then proceeded as between the republic of

Guatemala as plaintiffs and Nunez as defendant. The plaintiffs claimed that the sum of 23,696*l.*, which by amendment was substituted for the original claim of 21,533*l.*, was their property, and should be paid to them. The defendant Nunez claimed the moneys as the assignee of his father Manuel Cabrera, in whose name the fund was standing in the books of Messrs. Lazard Bros. In support of his claim a letter was produced on behalf of the defendant Nunez, dated July 24, 1919, signed by Cabrera, and addressed to Messrs. Lazard Bros. in New York, in which Cabrera requested them to transfer the balance of his account with their London house to Nunez. This letter Greer J. held to be a genuine document signed before July, 1921, and intended to operate as an assignment of the funds in question by Cabrera to his son Nunez. On July 20, 1921, the defendant Nunez and his solicitor gave oral notice of this assignment to Messrs. Lazard Bros. of New York, and on July 22 wrote to Messrs. Lazard Bros., London, giving them written notice of the assignment, which notice was received in London on August 4 and acknowledged on that date.

Various documents were produced by the plaintiffs in support of their claim, but while admitting these in evidence Greer J. held that the plaintiffs had not proved their case and dismissed their claim. The only point calling for report arose upon the defendant's claim, the question being whether the validity of this was to be determined by English law or by Guatemalan law. Evidence was given that by Guatemalan law an assignment of money exceeding $100 in amount if without consideration was void, unless made by a written contract before a notary, duly stamped, and unless the assignee signed before the notary to signify his acceptance. These formalities had not been complied with in the present case. Further by Guatemalan law a minor cannot accept a voluntary assignment; it must be made to and accepted by a tutor or legal representative appointed by a judge to act on his behalf. At the time of the assignment in question Nunez was a minor, and no legal representative had been appointed to act for him.

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Greer J. held that, the assignment having been executed in Guatemala, its validity must be determined by the law of that country, and by that law it was bad. He therefore dismissed the claim of the defendant also.

The defendant appealed. (1)

Comyns Carr K.C. and *Percy Handcock* for the respondents took a preliminary objection, that no appeal lay from the decision of the learned judge. By the Rules of the Supreme Court, Order LVII., r. 1, relief by way of interpleader may be granted—(*a*) where the person seeking relief (in the order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in the order called the claimants) making adverse claims thereto. By r. 5 the applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either maintain or relinquish them. By r. 7: "If the claimants appear in pursuance of the summons, the Court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant." By r. 8 the Court or a judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just. By r. 11: "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way, under r. 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by

(1) The plaintiffs also appealed, and their appeal was dismissed, but as it involved no question of law it was unnecessary to report it.

special leave of the Court or judge, as the case may be, or of the Court of Appeal." It was "otherwise provided" by s. 17 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), by which it was enacted that "the judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them." Then by s. 20 of the Appellate Jurisdiction Act, 1876, where by any Act of Parliament it is provided that the decision of any Court or judge the jurisdiction of which Court or judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or any judge thereof to the Court of Appeal. And the effect of this legislation is re-enacted by s. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), which provides, in sub-s. 1, that "No appeal shall lie . . . . (*d*) from the decision of the High Court or of any judge thereof where it is provided by any Act that the decision of any Court or judge, the jurisdiction of which or of whom is now vested in the High Court, is to be final." These enactments have been the subject of several cases. It was formerly considered that an appeal lay, by special leave, from the final order of a judge upon the whole of the interpleader proceedings: *Robinson* v. *Tucker* (1); and, without leave, from the decision of the interpleader issue: *Dawson* v. *Fox*. (2) Those two cases came before a full Court of Appeal in *Waterhouse* v. *Gilbert* (3), the decision in which necessarily involved the overruling of *Robinson* v. *Tucker* (1), and impliedly of *Dawson* v. *Fox* (2) also. It is well established that no appeal lies from the decision of a judge who decides the question raised in the interpleader summons without directing an issue: *In re Tarn* (4); *Van Laun* v. *Baring Brothers & Co.* (5)

(1) (1884) 14 Q. B. D. 371.
(2) (1885) 14 Q. B. D. 377.
(3) (1885) 15 Q. B. D. 569.
(4) [1893] 2 Ch. 280.
(5) [1903] 2 K. B. 277.

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[LAWRENCE L.J. referred to *Cox* v. *Bowen* (1) and *Mason* v. *Bolton's Library, Ld.* (2)]

The result is that no appeal lies from the decision of a judge, even with special leave, in interpleader proceedings.

Norman Birkett K.C. and *Harold Murphy* for the appellant were not called upon. Counsel were prepared to argue that the words in s. 17 of the Common Law Procedure Act, 1860, making the judgment of the Court or judge final and conclusive, applied only to a decision "in any such action or issue as may be directed by the Court or judge"; and that those words do not include an action which has been already instituted and to which the claimant has been made a defendant, but that such an action would be subject to the ordinary rules relating to appeals notwithstanding that the defendant or one of the defendants had been party to an interpleader proceeding.

The appeal was then argued on the merits.

Norman Birkett K.C. and *Harold Murphy* for the appellant. The validity of the assignment to Nunez of the debt payable by the English bank is governed by English law, for it was an English debt contracted and payable in England and therefore situate in England: *In re Maudslay, Sons & Field* (3); *Rex* v. *Lovitt* (4); *New York Life Insurance Co.* v. *Public Trustee.* (5) "Debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced": Dicey, Conflict of Laws, 3rd ed. (1922), p. 342. The debt in this case was properly recoverable in England after giving notice to the bankers, Messrs. Lazard: *Clare* v. *Dresdner Bank* (6); *Joachimson* v. *Swiss Bank Corporation.* (7) That being so the validity of any transfer or assignment of the debt is to be decided according to English

(1) [1911] 2 K. B. 611.
(2) [1913] 1 K. B. 83.
(3) [1900] 1 Ch. 602.
(4) [1912] A. C. 212.
(5) [1924] 2 Ch. 101.
(6) [1915] 2 K. B. 576.
(7) [1921] 3 K. B. 110.

law, and not the law of Guatemala; for it is a well known rule of law that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that the transfer as carried out is not in accordance with what would be required by law in the country where the owner is domiciled: *In re Queensland Mercantile and Agency Co.* (1), per North J.; *Alcock* v. *Smith* (2), per Kay L.J.; Foote, Private International Law, 5th ed. (1925), pp. 284, 293–296; Dicey, Conflict of Laws, 3rd ed., p. 562; *In re Korvine's Trusts.* (3) In *Commissioner of Stamps* v. *Hope* (4) Lord Field, delivering the judgment of the Privy Council, said: "It has long been established in the Courts of this country . . . . that a debt does possess an attribute of locality."

Greer J. was largely influenced by the decision of the Divisional Court in *Lee* v. *Abdy* (5), and it must be conceded that the facts of that case are indistinguishable from those of the present. That was an action by the assignee of a life policy against an English insurance company which had issued it. At the time of the assignment the assignor, the assured, and the assignee, who was his wife, were domiciled in Cape Colony, where the assignment took place, and by the law of that Colony such an assignment to a wife was void. There, as here, the contract was made in England and the money was payable in England, and it was held that the colonial law prevailed. But that case was wrongly decided, for it proceeded upon the mistaken assumption that a chose in action has no locality. The judgment of Greer J. was based upon the non-compliance with certain formalities connected with a stamp, the presence of a notary, etc., though there was also a further objection raised by the pleadings to the validity of the assignment, with which apparently he did not deal—namely, that Nunez, being an infant, was incapable of taking such a donation. According to rule 151 of Dicey's Conflict of Laws, 3rd ed., p. 560: "A person's capacity to assign a

(1) [1891] 1 Ch. 536, 545; affirmed [1892] 1 Ch. 219.
(2) [1892] 1 Ch. 238, 267.
(3) [1921] 1 Ch. 343.
(4) [1891] A. C. 476, 481
(5) (1886) 17 Q. B. D. 309.

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movable" (which must be read as including capacity to take by assignment) "is governed by the law of his domicil at the time of the assignment," but it goes on to say that that rule must be read subject to the effect of rule 153, and by that latter rule: "An assignment of a movable which cannot be touched, i.e. of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt) is valid." In other words, where the country of the domicil and that in which the debt is situate are different the law of the latter must prevail.

Comyns Carr K.C. and *Percy Handcock* for the respondents. The alleged assignment, even assuming that its validity depends upon English law, is invalid for want of consideration, notwithstanding *In re Westerton* (1), which was followed by Greer J., but is not binding upon this Court. But the question of its validity depends not upon English law, but upon the law of Guatemala. The rule of private international law is correctly stated in *Lee* v. *Abdy*. (2) A simple contract debt has no locality. It is true that the language of certain statutes relating to the public revenue makes it necessary to attribute a notional locality to debts. (3) It was equally necessary in *New York Life Insurance Co.* v. *Public Trustee* (4) to refer the debts, the subject of that action, to some locality because of the Treaty of Peace Act, 1919; the question was whether they were "property, rights or interests within His Majesty's Dominions," within the meaning of s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919. In no other case, except *In re Maudslay, Sons & Field* (5), has it been decided that, except for fiscal purposes, the law governing the disposition of movable property is the law of the place where the property is situate. Where the property consists of chattels they are usually to be found where their owner happens to be; the disposition takes place where the chattels are at the time, and it is not necessary to distinguish between the law of the country where they are and the law of the country

(1) [1919] 2 Ch. 104.
(2) (1886) 17 Q. B. D. 309.
(3) See for example *Commissioner of Stamps* v. *Hope* [1891] A. C. 476.
(4) [1924] 2 Ch. 101.
(5) [1900] 1 Ch. 602.

where the transaction is effected. This has led to confusion, especially where the act of transfer has been void by the law of the transferor's domicil but valid according to the law of the country where the transfer took place and where the chattels were situate; there the contrast is sometimes described as being between the country of the transferor's domicil and the country where the chattels are, instead of as between the country of the domicil and the country where the transfer takes place. See for example Dicey, Conflict of Laws, 3rd ed. (1922), pp. 561, 562, rule 152, where the Comment contradicts the Rule. In *Alcock* v. *Smith* (1) Kay L.J. says: "As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicil of the owner, but upon the law of the country where the transfer takes place." Then he goes on: "Our own law as to distress and market overt is illustrative of this"; and after considering the sale of a foreigner's goods under a distress, the Lord Justice continues: "The goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law." And why? Not because the goods were here, but because the transfer was effected here. It is the same with the transfer of choses in action: *North Western Bank* v. *Poynter* (2), per Lord Watson; *Inglis* v. *Robertson* (3), by the same learned Lord. It is therefore submitted that Cozens-Hardy J. was wrong in giving as the reason for his decision in *In re Maudslay, Sons & Field* (4), where creditors and debenture holders of an English company were asserting conflicting claims to a sum of money due to the company from a French firm, that the debt was a French asset and that therefore the rights of the claimants depended upon French law. The true reason was that by proceedings before a competent Court in France the successful claimants had acquired a charge in priority to their opponents. The judgment of Pollock M.R. in *New York Life Insurance Co.* v. *Public Trustee* (5) implies a warning

(1) [1892] 1 Ch. 238, 267.
(2) [1895] A. C. 56, 75.
(3) [1898] A. C. 616, 626.
(4) [1900] 1 Ch. 602.
(5) [1924] 2 Ch. 101.

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against applying the analogy of fiscal cases to questions like the present, where it is not necessary to assign any particular locality to the property in dispute. No doubt the Master of the Rolls decided that the law of the country where the debtor resides or, if he resides in two countries, the law of that country in which the debt is to be paid, is the situs of the debt; but the situs of the debt for the purpose of the Treaty of Peace, or for the purpose of the public revenue, has nothing to say to the question what law is to govern the assignment of the debt. The case of *Commissioner of Stamps* v. *Hope* (1), on which the appellant relies, does not support his contention that a debt possesses the attribute of locality. Lord Field was there dealing with the question whether a certain debt was within the local area of the probate jurisdiction of a particular State, so as to render it liable to the probate duty imposed by that State, and he intended his proposition to be limited to that particular purpose. The law which governs the assignment of a debt is the law of the country where the debt or chose in action is transferable: *Attorney-General* v. *Bouwens* (2) considered and discussed in *New York Life Insurance Co.* v. *Public Trustee.* (3) If it is transferable in two countries the law of the country in which it is in fact transferred must govern the validity of the assignment; that is in this case the law of Guatemala.

By that law the assignment was bad for two reasons; first, it was not carried out by means of a formal document executed before a notary and duly stamped; and secondly, the assignee was a minor, and as such was legally incapable of taking the donation.

Norman Birkett K.C. replied.

Cur. adv. vult.

Dec. 17. The following written judgments were delivered.

BANKES L.J. In this case both parties appeal from a decision of Greer J.

(1) [1891] A. C. 476, 480. (2) (1838) 4 M. & W. 171.
(3) [1924] 2 K. B. 107–109.

As originally commenced, this action was brought on behalf of the republic of Guatemala against Messrs. Lazard, Ld., a company carrying on business as bankers in the City of London, to recover a sum of 22,000*l.* odd which was alleged to be the property of the republic, and which had been wrongfully misappropriated by a former president of the republic and deposited by him with Messrs. Lazard in London. As Messrs. Lazard had, before the action was commenced, received notice of an assignment of the moneys by the president to a son of his, Manuel Estrada Cajas Nunez, they took out an interpleader summons, and eventually an order was made under which the republic became plaintiffs in the action and Nunez was substituted for Messrs. Lazard as defendant, and each party was ordered to deliver points of claim. As a part of the order, Messrs. Lazard were ordered to pay the money into Court, and this was done, and they ceased to have any interest in the matter. From the points of claim as delivered it appeared that the parties were agreed that the president referred to, Don Manuel Estrada Cabrera, had in or about 1906 deposited a sum of money with Messrs. Lazard which, with interest, amounted to the sum claimed in the action.

The claim of the republic to the money rested upon the allegation that it was the republic's money misappropriated by the then president, and reliance was placed on two documents dated respectively July 21 and October 11, 1921, in which the president in the most formal manner acknowledged that fact and directed Messrs. Lazard to pay the money to the republic. The answer of the defendant to this case was that the money was the president's money, and that the documents relied on were signed by the president after he had been deposed and when he was in prison, and whilst under duress and under such circumstances that no Court would give any effect to them.

The defendant's claim rested upon a document bearing date July 24, 1919, addressed to Messrs. Lazard by President Cabrera, which was relied on as being a good assignment by the president to the defendant, and of which notice had

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been given by the defendant to Messrs. Lazard. The answer of the republic to this case was that the so-called assignment was a nullity according to the law of the republic of Guatemala, and, further, that the document was a forgery in the sense that it had come into existence at some date much later than the date which it bore, and that it had been antedated with an intention to deceive and to defeat the effect of one or both of the two documents relied upon by the republic. These were the issues upon the one side and on the other which the learned judge had to try. He decided against both claimants, and both claimants appealed.

On the appeal of the defendant Nunez being called on, a preliminary objection was taken that no appeal lay from the decision of a judge in an interpleader matter. The objection was founded upon the provisions of s. 17 of the Common Law Procedure Act, 1860, s. 20 of the Appellate Jurisdiction Act, and the decision of this Court in *Van Laun* v. *Baring Brothers*. (1) After hearing counsel in support of the objection we overruled it and gave our reasons shortly. As the matter is of some importance, I think it better to put my judgment into writing. In this judgment the other members of the Court concur.

There is no doubt that upon the law as it at present stands there is no appeal in an interpleader matter where there has been a decision of the Court or a judge in a summary manner, and that the provisions of Order LVII., r. 11, do not confer upon a judge any power to give leave to appeal in such a case : see *Van Laun* v. *Baring* (1) ; *Waterhouse* v. *Gilbert* (2) ; and *In re Tarn*. (3) Sect. 17 of the Common Law Procedure Act, 1860, deals, however, not only with cases disposed of in a summary manner but also with judgments " in any such action or issue as may be directed by the Court or judge in any interpleader proceedings." The law with regard to this class of case is undoubtedly not in a satisfactory state. Sect. 17 is taken literally from the Interpleader Act of 1831, when, so far as actions were concerned, the trial would always

(1) [1903] 2 K. B. 277. (2) 15 Q. B. D. 569.
(3) [1893] 2 Ch. 280.

be before a judge and jury, and the practice on which treated the trial merely as the decision of an issue upon which final judgment could only be pronounced on reference back to the judge at chambers. Under such a system as this, in spite of the provision in s. 17 negativing any right of appeal, the right of challenging the verdict of the jury on any of the accepted grounds was recognized, the trial of the issue being treated as an intermediate stage between the order for the trial and final judgment. The practice up to the passing of the Judicature Act, 1873, is fully discussed by Pickford J. (as he then was) in *Cox* v. *Bowen* (1), and he also refers to the changes made by that Act and by the rules made thereunder. He points out that under the present practice trial by a judge alone is just as possible as trial by a judge and jury, and that with the object of doing away with the necessity of going back to the judge at chambers Order LVII., r. 13, was introduced, which enables the Court or judge to finally dispose of the whole matter of the interpleader proceedings.

What effect these changes have had upon the right to challenge the decision of a judge in an interpleader matter who tries an action or issue without a jury, has never been satisfactorily determined. Two cases were decided in the Court of Appeal in 1884: *Robinson* v. *Tucker* (2) and *Dawson* v. *Fox.* (3) In *Robinson* v. *Tucker* the issue had been tried by a judge and jury, and, therefore, the question of the right of appeal where the issue had been tried by a judge alone did not arise. In both cases, however, the Lords Justices comprising the Court treated the question as if no distinction existed between a trial by a judge with a jury and by a judge alone, and that, in spite of there no longer being any necessity to go back to the judge who directed the issue for a final judgment, an appeal lay. The first Court consisted of Brett, Bowen and Fry L.JJ., and the second consisted of Brett, Cotton and Lindley L.JJ. An opportunity occurred in the following year when, in *Waterhouse* v. *Gilbert* (4), the full Court, consisting of Brett, Baggallay,

(1) [1911] 2 K. B. 611.
(2) 14 Q. B. D. 371.
(3) 14 Q. B. D. 377.
(4) 15 Q. B. D. 569.

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Cotton, Lindley, Bowen and Fry L.JJ., sat to deal with the question of the right of appeal from a summary decision in an interpleader matter to put the matter right if the dicta in *Robinson* v. *Tucker* (1) and *Dawson* v. *Fox* (2) did not meet with their approval. Nothing, however, was said upon the point, and I think, therefore, that this Court should act upon the views expressed in those two cases, and hold that an appeal lies. The objection therefore fails and the appeal must proceed. I think it highly desirable that the difficulty occasioned by the retention of s. 17 in its present form should be got rid of as speedily as possible.

In the course of the hearing of the defendant's appeal, counsel for the republic endeavoured to introduce the question of possible claims to the money of creditors under the bankruptcy of President Cabrera on the ground that in an interpleader matter it was permissible to rely upon a jus tertii to defeat the defendant's claim. Upon objection being taken by the defendant's counsel the learned judge ruled that having regard to the state of the pleadings the republic ought not to be allowed to go into this question in this action. In my opinion he was right in so ruling, and the matter was not proceeded with, and the necessary evidence to support any such claim was not given. No notice of appeal against this ruling was given, and I merely mention the point because at one time Mr. Comyns Carr seemed inclined to rely on it before this Court, though I gathered that the claim to the right to do so was not persisted in.

The question which formed the main portion of the arguments addressed to us was whether it was the law of the republic of Guatemala or the law of this country which was to be applied in order to decide the questions in issue between the parties. Upon the question whether the moneys in dispute were always the property of the republic, and never the property of President Cabrera, it was apparently accepted by both parties that the law to be applied was the law of Guatemala, and, in the absence of evidence to the contrary, it was assumed that the law of that republic was the same as

(1) 14 Q.B.D. 371. (2) 14 Q.B.D. 377.

the law of this country. Greer J., in a very careful judgment, deals fully with the matters which were brought before him in the Court below in support of the claim of the republic. He decided against the claim and we have dismissed the appeal from that judgment.

Upon the defendant Nunez' appeal the question what law is to prevail is all important, because according to the law of Guatemala the document upon which the defendant relies as an assignment is null and void, whereas according to English law it is valid. Upon this point the appellant's counsel relied upon the statement of the law in Dicey on the Conflict of Laws, rule 153, that: "An assignment of a movable which cannot be touched, i.e. of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt) is valid." A number of authorities were quoted to us in support of the proposition that a chose in action has a location or a quasi-location which determines the law applicable to the contract, and it was contended that the dictum of Day J. in *Lee* v. *Abdy* (1) that a chose in action has no locality is not well founded. So far as the rule laid down in Mr. Dicey's book is concerned Greer J. points out in his judgment, as Cozens-Hardy J. had done already in *Maudslay's* case (2), that the authorities quoted in support of this rule do not bear out the statement; though Cozens-Hardy J. says that he agrees with it. I am quite prepared to assent to the argument of the appellant's counsel that the weight of authority is that a chose in action has a locality, or quasi-locality, which may determine the law applicable to the contract: see *Commissioner of Stamps* v. *Hope* (3); *In re Maudslay, Sons & Field* (2); *Dulaney* v. *Merry* (4); *Embiricos* v. *Anglo-Austrian Bank* (5); *Clare* v. *Dresdner Bank* (6); and *New York Life Insurance Co.* v. *Public Trustee.* (7) It is unnecessary, in in my opinion, to discuss the question whether the rule laid down in Mr. Dicey's book can ever apply. It finds support

(1) 17 Q. B. D. 312.
(2) [1900] 1 Ch. 602.
(3) [1891] A. C. 476.
(4) [1901] 1 K. B. 536, 542.
(5) [1905] 1 K. B. 677, 685.
(6) [1915] 2 K. B. 576.
(7) [1924] 2 Ch. 101.

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under some circumstances, and in cases, of which *Lebel* v. *Tucker* (1) may be an example, and in cases where the dispute arises upon the original contract itself.

Where the appellant's argument fails, in my opinion, is in not appreciating the distinction which, I think, exists between cases where the dispute arises on the original contract, and where, as here, the dispute is not in reference to the original contract at all but is one of priorities. Marshall C.J. draws pointed attention to the distinction between the two cases in a passage in his judgment in *Harrison* v. *Sterry* (2), where he says: "The law of the place where a contract is made is, generally speaking, the law of the contract; i.e. it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic." One branch of this dispute illustrates this distinction very clearly. It seems to be accepted that the claim of the republic to the money must be governed by the law of Guatemala. There is plenty of authority that this is so. In *Hooper* v. *Gumm* (3) the rival claimants were American mortgagees of the vessel when she was in America and subsequent purchasers for value without notice of the vessel when she was in England. The Lord Chancellor says (4): "As the *Edward Everitt* was built expressly for sale in this country, and the plaintiff Hooper advanced his money upon her, knowing the object, and for the express purpose of furthering it, he may fairly be considered to be in the same situation as a vendor. His legal title to the ship would, of course, be determined by American law; but the contract of sale and the effect of the intervention of the title of bona fide purchaser for valuable consideration must be governed by the law of England, where the contract was made"; and Turner L.J. (5) says: "Some question was raised in the course of the argument before us, as to the law by which this case ought to be decided; and though this point was not much gone into on either side on this occasion,

(1) (1867) L. R. 3 Q. B. 77.
(2) (1809) 5 Cranch, 289, 298.
(3) (1867) L. R. 2 Ch. 282.
(4) Ibid. 286.
(5) (1867) L. R. 2 Ch. 289.

it was more fully discussed when the case was argued before the late Lord Justice and myself; and it may be right for me therefore to say, that in my opinion the law of this country ought to govern the decision of the case, for the purchase of the ship, on which the rights of the question depend, was made and completed in this country. In saying this, however, I must not be understood to mean that the shipping law of America is not to be regarded in deciding the case; on the contrary I think that great regard must be paid to it. In order to determine what the rights of these parties now are, it must be ascertained what their rights were at the time when the purchase in question was made, and in order to ascertain this, resort must be had to the American shipping law. The rights of the parties stood upon that law at the time when this purchase was made, and I apprehend that where rights are acquired under the laws of foreign states, the law of this country recognizes and gives effect to those rights, unless it is contrary to the law and policy of this country to do so." In *Liverpool Marine Credit Co.* v. *Hunter* (1) Lord Chelmsford says this: "The transfer of personal property must be regulated by the law of the owner's domicil, and if valid by that law ought to be so regarded by the Courts of every country where it is brought in question." There are other authorities to a like effect. In *North Western Bank* v. *Poynter* (2) Lord Watson says: "When a moveable fund, situate in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is prima facie one of English law, and ought to be so treated by the Courts of Scotland. In this case the respective rights of Page & Co. and the appellant bank depend on transactions which took place between them in England. I see no reason to doubt that had there been any conflict between the laws of Scotland and England upon the question arising in this case it would have been proper for your Lordships to consider and apply the law of England." I refer also to the judgment of North J. in the *Queensland Mercantile* case. (3) In that case there were

(1) (1868) L. R. 3 Ch. 479, 483. (2) [1895] A. C. 75.
(3) [1891] 1 Ch. 536.

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rival claimants to a sum of money which, if the contract between the Queensland company and the debenture holders was the only matter to be considered, belonged clearly, according to the law of Queensland, to the debenture holders; yet it was held as between the rival claimants to belong to a company which, according to the law of Scotland, had acquired a prior title to it.

In the present case two rival claimants are by an interpleader procedure brought face to face. The original debtor has dropped out. There is no dispute on the original contract. It is a question between what for present purposes must be considered as two persons resident and domiciled in Guatemala at the time when their respective titles are alleged to have accrued. So far as the claim of the republic is concerned, it does not appear to be disputed that that must be ascertained according to the law of Guatemala. What difference in principle is there for the present purpose between that claim and the claim of the defendant? If instead of claiming as assignee of his father he was claiming as beneficiary under his father's will, the case would be unarguable. I do not think that the alleged distinction between the two cases is established. Both on principle and authority, I consider that the judgment of Greer J. on the point is correct.

The defendant's appeal must be dismissed with costs. There must be a set-off of costs. The money in Court must remain in Court to abide the order of the King's Bench Division.

SCRUTTON L.J. As to the question of the right of appeal from the judge below in this case, I concur in the judgment which my Lord has given; but I am under the impression that I have already given the reasons for my judgment earlier when we disposed of the point; and I only add, shortly, that my substantial reason is this: That, there being two decisions of this Court—*Robinson* v. *Tucker* (1) and *Dawson* v. *Fox* (2)—which upheld the right of appeal from a judge trying a case in Court, which judgments each contain

(1) 14 Q. B. D. 371. (2) 14 Q. B. D. 377.

dicta that the position is the same in a summary proceeding, yet when the full Court sat in *Waterhouse* v. *Gilbert* (1) to decide the question of appeal in a summary proceeding and held there was none, thereby undoubtedly overruling the dicta in the two previous cases, they said nothing, though they were a full Court, to the effect that they disapproved of the judgment on the main issue in the two previous cases, and under those circumstances I feel myself bound by the two previous decisions; and if the matter is to be altered without legislation it must be done by a higher tribunal; and, in my view, the sooner it is altered by the Rules Committee the better.

This appeal raises a question of some difficulty. Freed from the picturesque facts, which do not assist the Court to determine the dry question of law, the problem which emerges is this. One Cabrera, domiciled in Guatemala, and being in Guatemala at the time, deposited in an English bank in England a sum of money, thus creating a debt due by an English debtor, which must be demanded in England, but which, having been demanded in England, could be recovered by suit against the debtor in whatever jurisdiction he could be found: see *Clare & Co.* v. *Dresdner Bank* (2) and *Leader* v. *Disconto Gesellschaft*, cited therein. Some years afterwards, one Nunez, also a Guatemalan subject, claimed the deposit from the English bank. On being asked on what title he claimed, he produced a document passing between himself and Cabrera in Guatemala, both parties being then domiciled in Guatemala, purporting to be an assignment or a donation from Cabrera to Nunez of the right to recover the debt from the English debtor. It was proved that, if the effect of this document was to be determined by the law of Guatemala, the document was invalid. It was practically certain that if the document was to be determined by English law, apart from the question whether English law would determine the question by the law of Guatemala, the document was a valid assignment. Greer J. held that English Courts should decide the question according to the law of Guatemala,

(1) 15 Q. B. D. 569. (2) [1915] 2 K. B. 576.

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and therefore held that Nunez had no claim to the money. Nunez appeals.

The nature of the invalidity by the law of Guatemala is stated by Greer J., summarizing the evidence of Echevarria, the only witness called on Guatemalan law. It is this: That a donation or assignment without consideration can, by the law of Guatemala, only be made by a public document —that is, by a written contract or document made before a notary on stamped paper, both parties being present and both signing the document. If not so made the donation is a nullity. Further, where the donee is an infant he cannot accept the donation, which must be made to and accepted by a next friend appointed by the judge on the infant's behalf. In the present case there was no public document, stamp, or notary, but only a plain writing signed by the donor and not by the donee. At the time of the donation Nunez was an infant both by Guatemalan and English law, and there was no next friend. It will be seen, therefore, that if Guatemalan law, being both the law of the domicil of both parties and the lex loci actus, is to be applied, the document was a nullity. If English law, as the law of the situs of the debt assigned, or the lex loci solutionis of the contract to pay, is to be followed, the document was effective. It is to be assumed, however, that in any case it is English law which the English Courts enforce; the question is whether English law directs them to ascertain the validity of the assignment by the law of Guatemala, or by the law of England applicable to such documents.

On the question of the law applicable to an assignment of personal property invalid by the law of the country where the transaction takes place, or by the lex domicilii of the parties to the transaction, but valid by the law of the country where the property is, or is deemed to be, situate, the English authorities are scanty and unsatisfactory. Channell J., in *Dulaney* v. *Merry* (1), "had not found any clear case of a transfer, good according to the law of the domicil of the owner, and made there, but held bad for not conforming to the law of

(1) [1901] 1 K. B. 536, 541, 542.

the country where the goods are situate." Mr. Dicey has not found any clear case in reference to individual assignments by gift or sale as to the validity of an assignment good by the lex domicilii of the owner, but bad in the country where the goods are situate. Conversely, I have not been able to find, nor could counsel refer me to, any clear statement of the principles governing the question whether a transaction in personal property, as distinct from land, invalid by the law of the country where the transaction takes place, may be valid by the law of the place where the property is situate. Mr. Foote (1) points out that in most of the judgments where general statements are made the transaction took place in the country where the property was, and a conflict between the lex loci actus and the lex loci rei sitæ was not dealt with.

There seem to me, however, in this case to be two clear matters which help to a conclusion. First, in cases of personal property, the capacity of the parties to a transaction has always been determined either by the lex domicilii or the law of the place of the transaction; and where, as here, the two laws are the same it is not necessary to decide between them. In *Lee* v. *Abdy* (2) an assignment was made in Cape Colony by a man there domiciled to his wife of a policy issued by an English company, and it was assumed for the purposes of the case that such an assignment was invalid by the law of the Colony, husband and wife not being capable of entering into such a transaction. A Divisional Court, composed of Day and Wills JJ., held that, on that assumption, the assignment, though valid by the law of England, could not be enforced against the company in England. Neither judge draws a distinction between the lex domicilii or the lex loci actus. The Court of Appeal, in *Sottomayor* v. *de Barros* (3), a case of marriage, laid down in general terms: "It is a well recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil"; and Lord Halsbury says, in *Cooper* v. *Cooper* (4), that "incapacity

(1) Private International Law, 5th ed., p. 293.

(2) 17 Q. B. D. 309.

(3) (1877) 3 P. D. 1, 5.

(4) (1888) 13 App. Cas. 88, 99.

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to contract by reason of minority . . . . is regulated by the law of domicil." Lord Macnaghten, in the same case (1), is more doubtful, treating the question as not finally settled, but with a preponderance of opinion in favour of the lex domicilii. "But," he says, "when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper (the infant) could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled." Lord Watson (2) declines to decide the point, as the two laws are the same. The opinion of the Court of Appeal, in *Sottomayor* v. *de Barros* (3), in favour of the lex domicilii, was criticized by the same Court in *Ogden* v. *Ogden* (4) and by Sir James Hannen in the later *Sottomayor* case. (5) But most of the authorities seem to agree that capacity to contract depends either on the lex domicilii or the lex loci actus, and here they are the same: see also per Lord Eldon in *Male* v. *Roberts* (6), as to infancy. It seems to me, therefore, that Nunez, being a minor incapable by the law of his domicil or the law of the place where the transaction takes place, of receiving a valid donation, so that a gift to him, without the intervention of a next friend judicially appointed to receive it, would be void and a nullity in Guatemala, cannot claim that he has received a good title to the deposit by such an invalid donation.

This view would support the judgment of Greer J., but is not the express ground on which he puts his decision, which is, I think, that a contract void in the place where it is made, by reason of the omission of formalities required by the law of that place, is void elsewhere; the case of void contracts being distinguished from that of contracts merely inadmissible in evidence by reason of the absence of formalities, such as the requirements of stamp laws, not invalidating the contract itself. This seems to me a second point on which

(1) (1888) 13 App. Cas. 108.
(2) Ibid. p. 105.
(3) (1877) 3 P. D. 1, 5.
(4) [1908] P. 46.
(5) (1879) 5 P. D. 94, 100.
(6) (1799) 3 Esp. 163.

the authorities are fairly clear—namely, that where a transaction is invalid or a nullity by the law of the place where the transaction takes place owing to the omission of formalities or stamp, it will not be recognized in England. In *Bristow* v. *Sequeville* (1) Rolfe B. agrees "that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here," distinguishing it from a case where the contract is not void but only not admissible in evidence. To a similar effect are the judgments of Lord Ellenborough in *Clegg* v. *Levy* (2), and of Lord Kenyon in *Alves* v. *Hodgson* (3), which is explained by Pollock C.B. and Rolfe B. in *Bristow* v. *Sequeville* (1) as being a decision that, if the transaction be not a valid contract at the place where it is made, it is no contract at all. It seems to me that the principles laid down in *Colonial Bank* v. *Cady* (4), that the effect of a transaction must be determined by the law of the place where it was effected, have the same result. The negotiable instrument cases of *Alcock* v. *Smith* (5) and *Embiricos* v. *Anglo-Austrian Bank* (6) appear to proceed on the same principle. In each case a bill of exchange, accepted and payable in England and therefore representing an English debt, was dealt with in another country; in *Alcock's* case (5) by execution in Norway; in *Embiricos'* case (6) by purchase for valuable consideration in Vienna after theft and forgery of indorsement. In each case the foreign transaction would not have legal effect in England, but in each case it was held that, being valid by the lex loci actus, the English law would give effect to it. I cannot think that the suggested difference between the piece of paper and the chose in action represented by it is satisfactory. I refer to the judgments of Romer J. and of Kay L.J. in the former case. In the present case the private unstamped donation made in Guatemala from one Guatemalan subject to another was a nullity by the law of Guatemala. I think it was therefore a nullity by the law of England.

(1) (1850) 5 Exch. 275, 279.
(2) (1812) 3 Camp. 166.
(3) (1797) 7 T. R. 241.
(4) (1890) 15 App. Cas. 267, 283.
(5) [1892] 1 Ch. 238, 255, 277.
(6) [1905] 1 K. B. 677.

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Reliance was, however, placed on the opinion of Mr. Dicey as stated in rule 153 of his work on the Conflict of Laws, to which great weight is, of course, added by the opinion of Cozens-Hardy J. in *In re Maudslay* (1) that it is right. It is to be observed, however, firstly, that in this case the question was whether the English Courts would give effect to seizure in France of a French debt as against English debenture-holders administering an English company's affairs; that is to say, the lex loci actus and, if debts have a situs, the lex loci rei sitæ were the same; and the learned judge's opinion was therefore not necessary for the decision. Secondly, while Cozens-Hardy J. thinks the opinion of Mr. Dicey right, he also thinks the authorities cited by the author for that opinion do not support it; and Greer J., after consideration, has come to the same conclusion. It is therefore necessary to consider how far decided cases support the rule. As quoted by Mr. Dicey they are :—

(1.) *Innes* v. *Dunlop*. (2) This was a Scotch assignment of a Scotch bond in which the assignee sued in his own name in England and not in the name of the obligee. The defendant demurred, and, it was held thereby, admitted the assumpsit and the consideration, the action not being on the bond but in assumpsit. The defendant therefore failed. This appears merely to decide a pleading point.

(2.) *O'Callaghan* v. *Thomond* (3), where an assignee of an Irish judgment sued in his own name in England by virtue of Irish proceedings under an Irish statute. Here the law of the place of the debt and of the transaction were the same, and no principle favouring either was stated. The assignee was allowed to sue.

(3.) The *Queensland* case. (4) Here a Queensland company had Scotch shareholders who owed unpaid calls; an English company held debentures of the Queensland company charging the unpaid calls. A creditor of the Queensland company sued it in Scotland and arrested the unpaid calls. The law of Scotland gave such arrestment the effect of an

(1) [1900] 1 Ch. 602, 610.
(2) (1800) 8 T. R. 595.
(3) (1810) 3 Taunt. 82.
(4) [1891] 1 Ch. 536; [1892] 1 Ch. 2

assignment, taking priority over the claim of debenture holders without intimation. The English Court gave effect to the Scotch law. Here it will be seen that the law of the situs of the debt, the unpaid calls, and the law of the place of the transaction the effect of which was being considered, the arrestment, were the same, and it was therefore unnecessary to decide which would prevail in case of difference. North J. treated the law of the place where the debt was situate as overriding the law of the domicil of the creditor. He did not deal with the lex loci actus, which was also the lex loci rei sitæ. The Court of Appeal did not deal with the case in these terms at all but on the lines that the Scotch Court was administering the jus gentium and the English Court would not interfere. This appears to have no reference to the point under discussion here.

(4.) *Alcock* v. *Smith*. (1) This case I have already referred to, and in it a transaction valid by the lex loci actus was given an effect it would not have in the country where the debt was situate.

We were also referred to *Kelly* v. *Selwyn* (2), where, in the administration in England of the English estate of an English testator, priority was given to an English assignment, later in date but prior in notice, over an earlier New York assignment for which the law of New York did not require notice. Priorities have been said to be questions for the lex fori (*The Colorado* (3)), and I think this is the ground of the decision. It seems to me, therefore, that the authorities cited by Mr. Dicey do not support the proposition that a transaction as to an English debt, void by the law of the country where it takes place and by the law of the domicil of the parties to it, will be treated as valid in the country where the debt is deemed to be situated. In my opinion, both the capacity of the parties to enter into such a transaction and the validity and effect of such a transaction in form and results must be determined by one or other of those laws; and in this case they are the same.

(1) [1892] 1 Ch. 238. (2) [1905] 2 Ch. 117.
(3) [1923] P. 102.

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For these reasons, I think the judgment of Greer J. dismissing the claim of Nunez should be affirmed on the grounds (1.) that Nunez, as an infant, was not, by the law of Guatemala, capable of himself receiving a valid donation; and (2.) that the transaction, apart from infancy, was void as not carried out in the way required by the law of Guatemala.

The result is that both claims on the fund in Court fail. The Court has notice that the trustee in bankruptcy of Cabrera claims the fund, and the fund must remain in Court till that and any other claim made to the Court is disposed of.

LAWRENCE L.J. I concur in the judgment delivered by Bankes L.J. on the question of the right to appeal. I have already given my judgment concurring with the other members of the Court that the plaintiff's appeal fails and ought to be dismissed.

The effect of the dismissal of the plaintiff's appeal in my opinion is that the money on deposit at Lazard's bank in London must, at the date of the purported gift to the defendant, be taken to have been the property of his father, and that the only question to be determined on the defendant's appeal is whether such gift was valid.

Greer J., after seeing the defendant in the witness box, has found as a fact that the letter of July 24, 1919, is a genuine document, and in my judgment there is no valid ground for disturbing that finding. In these circumstances I am of opinion that the learned judge was right in deciding that, if the defendant's claim is to be determined according to the law of England (using that expression in its local or territorial sense), the letter, of which express notice in writing was given to the bank on August 4, 1921, operated as an absolute assignment of the bank's debt, effectual in law to pass the legal right to such debt, from the date of such notice, to the defendant by virtue of s. 25, sub-s. 6, of the Judicature Act, 1873 (now replaced by s. 136 of the Law of Property Act, 1925), notwithstanding that the assignment was not made for valuable consideration. The case of

In re Westerton (1), to which the learned judge referred in support of his decision, is directly in point and was in my opinion rightly decided.

The defendant contended that his claim ought to be determined according to the law of England and not according to the law of Guatemala, basing his contention on rule 153 of Dicey's Conflict of Laws, and the main questions which were debated before this Court were: first, whether that rule correctly states the law; and, secondly, whether, on the facts, the defendant's case falls within it. In considering this rule in connection with the defendant's claim, it is, I think, important to bear in mind that the rule does not purport to deal with contracts to assign, testamentary dispositions, or so-called universal or general assignments, to each of which cases different rules are applicable. Although I have not been able to discover any direct decision affirming the correctness of the rule, I am of opinion that the weight of judicial opinion in England is in favour of the view that it expresses the true principle when applied to a particular assignment inter vivos such as the one in question here. There are many cases—some of which have been cited at the bar—which show that a debt may have, and frequently has been recognized by the Court as having, a local situation or quasi-situation; as an example I need only refer to the recent case of *New York Life Insurance Co.* v. *Public Trustee.* (2) Whenever a local situation can properly be attributed to a debt it seems to me logically to follow that the same principle should be applied to its assignment as is applicable to the transfer of goods, and I concur in the opinion expressed by Cozens-Hardy J. in *In re Maudslay, Sons & Field* (3) that rule 153 is correct and is a necessary consequence from the admission that a debt has a locality or quasi-locality. The principle that a transfer of goods made according to the lex situs is valid is, in my opinion, well established: see rule 152 of Dicey and the cases referred to in the comments on such rule. North J., in *In re Queensland,*

(1) [1919] 2 Ch. 104. (2) [1924] 2 Ch. 101.
(3) [1900] 1 Ch. 602, 610.

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etc., *Co.* (1), after stating that there is a well known rule of law "that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required, by law in the country where its owner is domiciled," applied that rule to an assignment (by legal process or arrestment) of debts. This case was affirmed on appeal on a different ground, but no doubt seems to have been cast in the Court of Appeal either upon the correctness of the rule as stated by North J. or upon its applicability to an assignment of a debt. Channell J. in *Dulaney* v. *Merry & Sons* (2) states: "It seems clear that a transfer of movables here good by our law would here be held good, notwithstanding that it might not comply with formalities required by the law of the domicil of the owner, but there has not been quoted to me, nor have I found, any clear case of a transfer, good according to the law of the domicil of the owner, and made there, but held bad for not conforming to the law of the country where the goods were situate." That was a case of a general assignment to a representative of the assignor's creditors, and the learned judge held that it was valid notwithstanding that it was not registered in accordance with the requirements of the law of England. I only cite that case (the decision in which does not in my opinion bear on the question here) for the purpose of showing that in arriving at his decision the learned judge did not intend to cast any doubt on the applicability of the lex situs to the case of a particular assignment of movables. The case of *Alcock* v. *Smith* (3) seems to me also to support the correctness of rule 153. Greer J., however, held that rule 153 is too widely stated, and that it does not apply to a case like the present where the assignment of the debt was made in the place where both parties to it were resident and domiciled. In so deciding the learned judge relied upon the decision in *Lee* v. *Abdy* (4), and especially on the concluding words of the judgment of Day J. In that case an assignment

(1) [1891] 1 Ch. 536, 545.
(2) [1901] 1 K. B. 536, 541.
(3) [1892] 1 Ch. 238.
(4) 17 Q. B. D. 309, 313.

of an English policy of assurance in the Cape of Good Hope to the wife of the assignor was held invalid as being contrary to the law of the place where both the parties to it were domiciled. Day J. apparently decided the case on the grounds that a chose in action has no locality and that the assignment existed (if at all) only by virtue of a contract between the assignor and assignee, and held that as there was no valid contract to assign there was no valid assignment. In my opinion the learned judge was wrong both in stating as a general proposition of law that a chose in action has no locality and also in holding that the validity of the assignment (which for all that appears in the report may have been a voluntary assignment) depended upon the existence of a prior valid contract to assign and then deciding the case as if it were one of contract. Wills J., on the other hand, based his judgment on the proper law of the original contract between the assignor and the assurance company, holding that in the special circumstances the parties to that contract must be presumed to have intended that if the contract were assigned it would be assigned according to the law of the Cape. In my opinion the reasons given by the learned judges for their decision afford no assistance in determining the questions which have arisen in the present case, as it is clear that the Court declined to treat the debt of the assurance company as having a local situation in England, and apparently did not base their decision on the fact that the assignment was from a husband to his wife—a transaction which by the law of their matrimonial domicil they were disabled from carrying out.

In the present case the debt is connected in so many ways with England that there is no difficulty in arriving at the conclusion that it has its situation or quasi-situation in England. The contract with the bank was made in England—the nature and extent of the bank's obligations under the contract fall to be determined by English law—the debt is payable in England where the bank is resident and domiciled, and England is the place where the debt is properly recoverable. In the case of a debt so situated I am unable to appreciate

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why on principle an assignment valid according to the lex situs should be rendered ineffectual merely because it was made in Guatemala, where the parties to it were domiciled, and because it did not comply with the requirements of the law of Guatemala. If intention has anything to do with it, I should have thought that the presumed intention of the parties to the assignment was that, as the assignment was to operate on a debt in England, it should be governed by the law of England and not by the law of Guatemala, according to which it was a nullity and passed nothing. The assignor must have contemplated that his written order to the bank to transfer the debt to the defendant would be obeyed. If the case had been one of contract and the defendant were seeking to enforce here a contract to assign the debt made in Guatemala it may well be that he might have to establish that the contract was valid according to the law of Guatemala, but in my opinion that raises a different question from the one which has to be determined here.

Then it was contended that even if the assignment operated to transfer the legal right to the debt yet the beneficial rights ought to be ascertained in accordance with the law of Guatemala, and as according to that law the beneficial interest in the debt did not pass out of the ownership of the assignor his representatives are now entitled to it. In support of this contention the case of *Colonial Bank* v. *Cady & Williams* (1) was cited. In my opinion it has no application to the facts of the present case. There the owners of the shares had never intended to part with them, and the sole question was whether they were estopped from saying that their broker had not their authority to dispose of the certificates. It was held, affirming the decision of the Court of Appeal, that in the circumstances they were not so estopped and that the bank had not acquired a title to the shares. It appears that on that point the principles of the American law did not differ in any material respect from those by which an English Court would be guided in similar circumstances. Lord Herschell (2) says: "I agree

(1) 15 App. Cas. 267. (2) 15 App. Cas. 283.

that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here." In the present case there was a clear intention on the part of the assignor to transfer the debt to the defendant, and in those circumstances I am of opinion that so far from the *Colonial Bank* case (1) being an authority in favour of the respondents it supports the defendant's case that the assignment, if it operated at all, operated to pass to the defendant both the legal right to and the beneficial interest in the debt: see also Westlake, Private International Law, 7th ed., § 153, p. 210.

There remains to be considered the vital question whether the fact that the defendant was an infant at the date of the assignment renders it ineffectual. The solution of this question in my opinion depends, first, upon whether the impediments placed by the law of Guatemala in the way of an infant's acceptance of a voluntary assignment are only matters of form or whether they are matters of substance and demonstrate the infant's incapacity to accept such an assignment, and, secondly, upon whether the defendant's capacity to accept the assignment ought to be determined according to the law of England or according to the law of Guatemala. In Cowell's Interpreter "capacity" is defined as "an ability or fitnesse to receive: In Law it signifies when a man or body politick is able to give or take lands or other things or to sue actions." (2) According to the law of Guatemala as found by the learned judge, a voluntary assignment to an infant is a nullity unless his father or mother or some representative appointed by the judge attends before the notary at the time of the assignment to notify

(1) 15 App. Cas. 267.
(2) [This appears to be an addition by a later editor; it is not in ed. pr. Camb. 1607.]

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to the assignor his or her acceptance of the assignment on behalf of the infant. In my opinion this requirement of the law of Guatemala cannot properly be termed a mere formality. It seems to me to be a matter of substance. The assignment has no operation unless a third person over whom the infant has no control accepts it on his behalf. Unlike the case of an adult, the infant cannot himself go before a notary and accept; he is powerless to compel anybody to accept on his behalf; he has no voice in the question whether the assignment should be accepted or not; it may be accepted or refused on his behalf without consulting him and even against his wishes. In these circumstances I have come to the conclusion that according to the law of Guatemala the defendant was in the present case disabled from accepting the assignment of the debt, and therefore if his capacity to take is to be determined according to the law of Guatemala the assignment ought to be held to be invalid, whereas if the capacity to take is to be determined by the law of England the assignment ought to be held valid.

This brings me to the final point whether the capacity of the defendant is to be determined by the law of England or by the law of Guatemala. Westlake (see 7th ed., para. 2) seems to favour the view that the weight of authority is in favour of the proposition that when the capacity of a person to act in any given way is questioned on the ground of his age, the solution of the question will be referred in England to his personal law. Foote (see 5th ed., p. 100), on the other hand, seems to be of opinion that the better opinion is that in such a case the law of the place where the act is done is the proper law to decide all questions of capacity. As in the present case the lex domicilii and the lex loci actus are the same, no useful purpose would be served in discussing which of these two views is the right one. Dicey (see p. 560), on the other hand, seems to consider that rule 151, which states that a person's capacity to assign (and therefore I assume a person's capacity to take) a movable is governed by the law of his domicil, is in case of conflict subject to rule 153, and submits that where in fact a good title to a movable is

acquired under the lex situs it will be treated as valid in England even though the person (e.g., a minor) conferring a title under the lex situs was incapable of giving a good title under his lex domicilii: see p. 561. If this principle be sound it would in my opinion apply to the converse case of a minor accepting an assignment under the lex situs although incapable of accepting under his lex domicilii, and would operate so as to confer a valid title to the debt on the defendant. I have, however, been unable to find any authority (with the possible exception of the cases of *Worms* v. *De Valdor* (1) and *In re Selot's Trusts* (2)) which bears out Dicey's opinion upon this point. The two cases to which I have alluded, even if correctly decided, do not in my opinion touch the present case, where the incapacity was due to the minority of the defendant: at the most they tend to show that the Courts here will not recognize an incapacity unknown to the law of England. In the absence of any binding authority I decline to accept as sound the proposition that the English Courts will treat as valid an assignment of a movable where the assignee is owing to his minority incapable of taking, both under his lex domicilii and under the lex loci actus.

In the result I have come to the conclusion that the gift to the defendant, who by his personal law and by the law of the place where it was made was disabled from accepting it, cannot properly be treated as valid in England notwithstanding that the subject-matter of the gift was situate here. In my opinion therefore the appeal fails on the sole ground of the defendant's incapacity to accept the assignment.

Appeal dismissed.

Solicitors for the appellant: *Stephenson, Harwood & Tatham.*

Solicitor for the respondents: *J. R. Cort Bathurst.*

(1) (1880) 49 L. J. (Ch.) 261. (2) [1902] 1 Ch. 488.

J. F. C.
W. H. G.

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Local Government—Hackney Carriage—Motor Omnibus—"Plying for hire" without Licence—Issue of return Ticket—Picking up Holder of return Ticket within prescribed District—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 45—*Town Police Clauses Act*, 1889 (52 & 53 *Vict. c.* 14), *s.* 3.

The respondents, a limited company, were the proprietors of motor omnibuses by which they conducted a regular daily service between two districts through several intermediate districts, the omnibuses being licensed to ply for hire in all these districts except one of the intermediate districts. The appellant entered one of the omnibuses in a terminal district and took a return ticket for a place within the district for which the omnibuses were not licensed, the ticket being available for return by any of the omnibuses. On arrival within the latter district the appellant left that omnibus, and shortly afterwards she was there received as a passenger in another of the omnibuses, by which she was conveyed back to the district from which she had come:—

Held, that the latter omnibus was not, by reason of the appellant having been received therein as a passenger for the return journey, "plying for hire" within the meaning of the Town Police Clauses Acts, 1847 and 1889.

Armstrong v. *Ogle* [1926] 2 K. B. 438 distinguished.

Sales v. *Lake* [1922] 1 K. B. 553 followed.

CASE stated by justices for the county of Monmouth.

An information was laid under the Town Police Clauses Acts, 1847 and 1889 (1), by Norah Leonard (hereinafter called "the appellant") against Western Services, Ld.

(1) Town Police Clauses Act, 1847, s. 45: ". . . . if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance, for which such licence as aforesaid has not been previously obtained, ... every such person so offending shall for every such offence be liable to a penalty not exceeding forty shillings."

The Town Police Clauses Act, 1889, is by s. 2 to be construed as one with the principal Act of 1847.

By s. 3: "The term 'omnibus' where used in this Act shall include—Every omnibus, char-à-banc, wagonette, brake, stage coach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance; but shall not include— . . . . Any omnibus starting from outside the prescribed distance, and bringing passengers within the prescribed distance, and not standing or plying for hire within the prescribed distance."

By s. 4: "The several terms 'hackney carriages,' 'hackney coach,' 'carriages,' and 'carriage,' whenever used in Sections 37, 40 to 52 (both inclusive), 54, 58, and 60 to 67 (both inclusive) of the principal Act shall, notwithstanding anything contained in Section 38 of that Act, be deemed to include every omnibus."

(hereinafter called "the respondents"), for that they being the proprietors of a certain hackney carriage to wit a motor omnibus did on June 13, 1926, unlawfully permit the said motor omnibus to be used as a hackney carriage plying for hire in the district of Risca without having obtained a licence to ply for hire for the said carriage for the said district as required by the Act in that behalf.

On July 3, 1926, the information was heard by the justices.

Upon the hearing of the information the following facts were admitted or proved:—

(*a*) The respondents were a limited company having their registered office at Tredegar in the county of Monmouth, and were the owners of a number of motor omnibuses and ran a regular daily service of these omnibuses between Tredegar and Newport, through Blackwood, Pontllanfraith, Ynysddu, Cwmfelinfach, Wattsville, Cross Keys, Risca, Pontymister and Rogerstone.

(*b*) At 4 P.M. on June 13, 1926, the appellant entered a motor omnibus belonging to the respondents and numbered 6 while it was standing at Mill Street in the borough of Newport, and booked a return ticket to Risca Station Approach and paid 1*s.* for it. The ticket was in form, so far as material, as follows: "....3726. 1*s.* return. The Western Services, Ltd. The whole of this ticket to be retained for return journey. Available on day of issue only. Issued subject to the company's regulations." The passenger regulations of the company contained the following clause: "3. Return tickets available day of issue only...." The said omnibuses were duly licensed to ply for hire in all the areas above-mentioned other than in the Risca area.

(*c*) The said motor omnibus No. 6 stopped at Risca Station Approach, being within the prescribed distance of the area of the Risca Urban District, and the appellant got out.

(*d*) After waiting at the said Risca Station Approach and within the prescribed distance of the area of the Risca Urban District Council for a short while, the appellant hailed a motor omnibus belonging to the respondents, which was travelling in the direction of Newport.

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(*e*) The said motor omnibus duly stopped and the appellant boarded it, and was accepted and conveyed as a passenger in it to Newport.

(*f*) As she boarded the said omnibus the appellant was asked by the conductor if she had a return ticket, and she said "Yes," and at the same time another person who had not a return ticket and attempted to board the said omnibus was refused admission.

(*g*) The omnibus which the appellant boarded on the return journey was numbered 2, and was a different omnibus from the one which had conveyed her from Newport to Risca, but both omnibuses belonged to the same proprietors—namely, the respondents.

(*h*) The said return ticket issued to the appellant was available for return by any omnibus belonging to the respondents, which had sufficient accommodation for her.

(*i*) No accommodation was specially reserved in the omnibus in which the passenger had made the outward journey or in any particular omnibus of the respondents for passengers to whom return tickets had been issued.

(*j*) No licence to ply for hire within the said prescribed distance of the area of the Risca Urban District had been obtained in respect of either of the said omnibuses.

On the part of the appellant it was contended that upon the facts as proved or admitted an offence had been committed by the respondents under the aforesaid statutes. The case of *Armstrong* v. *Ogle* (1) was cited as an authority in favour of the appellant's contention.

On the part of the respondents it was contended that as the appellant had booked her ticket outside the prescribed distance and had returned in accordance with the contract made outside the prescribed area, the respondents were not plying for hire within the district of Risca within the meaning of the statutes, and that the decision in the case of *Armstrong* v. *Ogle* (1) did not apply.

The justices were of the opinion that there had not been a plying for hire by the respondents within the district of

(1) [1926] 2 K. B. 438.

Risca within the meaning of the aforesaid Acts and dismissed the information.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination and decision in law, and if not what should be done in the premises.

E. W. Cave K.C. (*A. T. James* with him) for the appellant. The respondents permitted the motor omnibus in question to be used as a hackney carriage "plying for hire" in the district of Risca without having obtained a licence pursuant to the Town Police Clauses Acts, 1847 and 1889. When the omnibus was within that district the conductor of it, as representing the respondents, agreed with the appellant that she should be conveyed in it as a passenger on the return journey in consideration of her having paid the return portion of her fare. He thus picked up a passenger within that district. This case is indistinguishable from that of *Armstrong* v. *Ogle*. (1) In that case omnibuses belonging to the several members of an association of omnibus proprietors ran between two districts through intermediate districts, in one of which they were not licensed to ply for hire; a passenger to whom a return ticket had been issued in a terminal district entered one of the omnibuses in the unlicensed district for the return journey; and it was held that the omnibus in taking up the passenger was plying for hire within the unlicensed district. Similarly, in the present case the respondents accepted the appellant who held a return ticket as a passenger for the return journey in one of their omnibuses in an intermediate district in which it was not licensed to ply for hire, and they have therefore been guilty of a contravention of the Acts. It is immaterial, as a distinction between the two cases, that in that case the return ticket was available either on the day of issue or at any future time, whereas here it was available for the day of issue only. Although it is stated on this ticket that it is limited to the day of issue, the ticket in fact bears no date.

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C. Paley Scott for the respondents. The respondents by accepting the appellant as a passenger in one of their omnibuses for a return journey in the district for which they were not licensed were not in the circumstances "plying for hire" in that district within the meaning of the Town Police Clauses Acts, 1847 and 1889. The owner of a vehicle does not use it as a vehicle plying for hire in a district within the meaning of the Acts, unless within that district he invites a person to enter into a contract with him or enters into a contract with a person for carriage in the vehicle in consideration of his receiving from that person a fare or some equivalent benefit or advantage. The respondents did not within the district for which they were not licensed enter into any contract of that description with the appellant or invite her to enter into any contract of that description with them. All that they did within that district was to receive her into one of their omnibuses as a passenger for the return portion of a journey for which she had already booked a ticket at a place beyond the prescribed distance of that district. It is said that the respondents by receiving the appellant into the omnibus within that district were "picking up a passenger" within that district. That is an ambiguous expression which may mean either receiving a passenger with whom a contract is then and there entered into for carriage for hire, or receiving a passenger with whom no such contract is then and there entered into as, for example, a passenger with whom a contract has elsewhere been entered into and who holds a return ticket. It is only in the former and not in the latter of these senses that that expression is equivalent to plying for hire. It is only in the latter of these senses that the expression is applicable to the act of the respondents in receiving the appellant into their omnibus in the district in question. The present case is clearly distinguishable from *Armstrong* v. *Ogle*. (1) In that case the proprietor of the omnibus was a member of an association of omnibus proprietors who had entered into a mutual arrangement that the fares booked on all their omnibuses should

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be brought into a common fund and an adjustment made by which each member of the association should receive the actual earnings of his own vehicles. Under that arrangement it was to the pecuniary interest of each proprietor to pick up any passenger who held a return ticket which had been issued to him by any other proprietor, as by doing so he became entitled to the portion of the fare applicable to the return journey. In picking up such a passenger as that in his omnibus in a district for which it was not licensed, the proprietor of the omnibus was held to be there plying for hire. In the present case the respondents were themselves the proprietors of all the omnibuses, and when they issued the return ticket to the appellant in consideration of the fare they contracted to bring her back in any of their own omnibuses which had room for her without any further fare or pecuniary advantage. When they accepted the appellant in the district in question as a passenger for the return journey they received no further pecuniary advantage beyond the fare which she had already paid to them. By doing so not only did they secure no additional pecuniary benefit, but they lost the advantage which they would have enjoyed if she had not offered herself as a passenger for the return journey, but had returned by train or in some other way. The motor omnibus in question was not an "omnibus" within the meaning of that term as defined for the purposes of the Acts by s. 3 of the Act of 1889, inasmuch as it comes within the last exception under that section of "any omnibus starting from outside the prescribed distance, and bringing passengers within the prescribed distance, and not standing or plying for hire within the prescribed distance"; and therefore by s. 4 it is not included in the terms "hackney carriage" or "carriage" as used in the Acts. This case is covered by *Sales* v. *Lake* (1), from which it appears that there is no plying for hire by a vehicle in a district, unless there is a soliciting of persons to contract to become passengers in the vehicle and an apportioning to them of room in the vehicle.

(1) [1922] 1 K. B. 553.

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LORD HEWART C.J. In this case the justices were of opinion that there had not been a plying for hire by the respondents in the district referred to within the meaning of the Town Police Clauses Acts, 1847 and 1889. The question for this Court is whether upon the facts stated in the special case the justices came to a correct determination and decision in law. In other words, the question is whether there was evidence upon which the justices were entitled to found the conclusion at which they arrived. The argument on behalf of the appellant was and is that this case is concluded by the decision in the case of *Armstrong* v. *Ogle* (1), but I am satisfied by the argument of Mr. Paley Scott that this case is distinguishable from that case. In the present case there is no such element as the pooling arrangement or plan existing among several omnibus proprietors which was an essential feature of the scheme of business in *Armstrong* v. *Ogle*. (1) The effect of that pooling arrangement was, amongst other things, that every owner in the association of owners was interested in attracting to his own omnibuses as many persons as he could who had not made contracts with himself, but who had made contracts with some other of the associated proprietors, the result of his attracting those persons to his omnibuses being that in the readjustment of accounts he collected money in respect of their fares which he would not otherwise have collected. In the present case, so far as the facts are known to us, it appears that no person is taken aboard any of the respondents' omnibuses in the district referred to except persons with whom the respondents have previously themselves made contracts. There is no occasion for soliciting passengers within the district. It is not open to the omnibus driver by diligence or by skill to attract to his employers the customers of other employers. There is therefore no plying for hire in the district, the hiring having already been done. In these circumstances, it seems to me that this case is distinguished from the case of *Armstrong* v. *Ogle* (1), and that it comes very

(1) [1926] 2 K. B. 438.

much nearer to *Sales* v. *Lake* (1), which was much discussed in that case.

For these reasons I am not prepared to say that the justices came to a wrong conclusion here, and I think that this appeal ought to be dismissed.

AVORY J. I agree that this case is distinguishable from the case of *Armstrong* v. *Ogle* (2) on the ground which my Lord has pointed out—namely, that there is not here the arrangement between separate omnibus proprietors which existed in that case, and which there formed the basis of my Lord's judgment, and, I may say, of my own judgment also. As soon as the present case is distinguished from *Armstrong* v. *Ogle* (2) on that ground, it seems to me to fall within the authority of the case of *Sales* v. *Lake*. (1) In fact *Armstrong* v. *Ogle* (2) was only distinguished from *Sales* v. *Lake* (1) on that very ground which has been mentioned by my Lord as distinguishing the former of these cases from this case. That being so, it appears to me that this case falls within the authority of *Sales* v. *Lake* (1), and I must follow that case although, as I have previously said, I was a reluctant assenting member of the Court to the decision in that case.

SALTER J. I am of the same opinion. Without attempting any exhaustive definition of the expression, I think that in order to constitute "plying for hire" within the meaning of the Acts there must be a general invitation by the person in charge of the vehicle to members of the public to make contracts with him for carriage in the vehicle. In the present case, so far as the evidence goes, the person in charge of this omnibus No. 2 did not solicit any contract of carriage with any person within the district in question. He certainly made no contract within that district with the passenger mentioned in the case. She had already made a contract with his employers outside the district, and she was merely demanding and receiving the performance

(1) [1922] 1 K. B. 553. (2) [1926] 2 K. B. 438.

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of that contract. It therefore seems to me that the justices were right.

Appeal dismissed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for T. S. Edwards & Son, Newport, Mon.*

Solicitors for respondents: *Rhys Roberts & Co., for J. T. Richards, Cardiff.*

J. R.

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Dec. 8, 9, 21.

MOLTHES REDERI AKTIESELSKABET *v.* ELLERMAN'S WILSON LINE, LIMITED.

[1926. M. 2990.]

Shipping—Charterparty—Sub-charterparty—Bill of Lading—Shipowner's Lien for unpaid Hire—Notice to Charterer's Agent to collect Freight for Shipowner.

When a ship is chartered by a charterparty not amounting to a demise, and subsequently the ship is sub-chartered for a single voyage and bills of lading are signed by the master in respect of cargo carried on that voyage, the contract contained in the bills of lading is a contract with the shipowner, who, if there is unpaid hire due to him, is entitled to intervene and by notice to the charterer's agent require that the bill of lading freight be collected on his behalf. Thereupon the agent must account to the shipowner for the freight received without deduction of any disbursements already laid out by him on the charterer's behalf.

Whether the agent in such a case is bound to account for freight actually received by him before receipt of such a notice from the shipowner, *quaere*.

Wehner v. *Dene Steam Shipping Co.* [1905] 2 K. B. 92 discussed.

Tagart, Beaton & Co. v. *Fisher & Sons* [1903] 1 K. B. 391 only governs a case where the shipowner is bound to rely on a lien; it does not affect a case where he can claim freight as due to him on the bill of lading contract.

ACTION tried by Greer J.

The following statement of facts is taken in substance from the judgment. The plaintiffs, the owners of the steamship *Sproit*, sued the defendants, shipowners and shipbrokers at Hull, to recover the sum of 199*l.* 15*s.*, which they said the defendants received on their behalf.

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On October 23, 1924, the plaintiffs agreed to let to Maurice Elliff & Co. the *Sproit*, for twelve calendar months, by a charterparty known as the Baltic and White Sea Time Charter, 1912, of which the following were the material clauses :—

" 2. That the owners shall provide and pay for all the provisions and wages, and for the insurance of the steamer and for all deck and engine room stores and maintain her in a thoroughly efficient state in hull and machinery for and during the service. . . . ."

" 3. That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug assistance, consulages (except consular shipping and discharging fees of the captain, officers, engineer, firemen and crew), canal, dock and other dues and charges (also to pay all dock, harbour and tonnage dues at the port of delivery and redelivery unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, expenses of loading, trimming, stowing, unloading, weighing, tallying and delivery of cargoes, surveys on hatches and protests (if relating to cargo), and all other charges and expenses whatsoever, except those above stated."

" 5. That the said charterers shall pay as hire for the said steamer 410*l.* per calendar month, commencing from the time the steamer is placed at the disposal of charterers and pro rata for any fractional part of a month . . . . until her re-delivery to owners as herein stipulated. That the payment of the hire shall be made as follows : in London in cash without discount, monthly in advance."

" 9. That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew. Although appointed by the owners the captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements ; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain or officers personally or by agents signing

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bills of lading or other documents or otherwise complying with such orders, as well as from any irregularity in the steamer's papers or for over carrying goods. Owners shall not be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise, the stevedore being employed by the charterers."

"15. That should the captain require funds for ordinary disbursements for steamer's account at any port, charterers or their agents are to advance the same, such advances shall be deducted from the next hire, but charterers shall in no way be responsible for the application of such advance."

"21. That the owners have a lien upon all cargoes and all sub-freights for hire and general average contribution, and for all expenses and damages due under or for breach of this charter and charterers to have a lien on the steamer for all moneys paid in advance and not earned."

"23. That the charterers shall have the option of sub-letting the steamer, giving due notice to owners, but the original charterers always to remain responsible to owners for due performance of this charter."

The charterparty was not a demise of the ship, and the shipowners throughout remained in possession and control of her.

On January 8, 1926, the charterers' agents sub-chartered the vessel by a voyage charter in the Scanfin form to carry a cargo of wood to Hull. This charter provided that bills of lading were to be prepared on the form indorsed on the charter and signed by the master, and that the master or owners were to have an absolute lien upon the cargo for all freight, dead freight and demurrage.

A cargo was loaded at Riga in accordance with the sub-charter and carried to Hull, bills of lading being issued to the shippers. The freight on a considerable part of the cargo was payable, and was paid, in advance to the time charterers' agents at the port of shipment, but the freight on part of the cargo consisting of pit props was not due in advance, but was to be paid in Hull on right delivery thereof. The vessel

arrived in Hull early in February and began her discharge. A considerable amount of hire money was in arrear, and Messrs. Sanderson & Co., Solicitors, Hull, received instructions from the owners through their Protection Club to collect the freight. In the meantime the defendants had been appointed by the charterers as agents to attend to the discharge of the vessel and collect the freight. On the morning of February 10, while the vessel was discharging, but before any freight had been paid in respect of the pit props, Mr. Sanderson telephoned to the defendants saying that he had been instructed to collect the freights payable at Hull, and if necessary to have a lien placed on the cargo to secure payment, and asked for an assurance that the defendants would collect the freights on owners' account. This assurance Mr. Lamb, who received the message and dealt with the matter on behalf of the defendants, did not give at the time, but it was arranged that there should be a further interview later in the day. Mr. Sanderson then wrote a letter on February 10 confirming what took place at the morning interview. At that interview Mr. Sanderson claimed, on behalf of the owners, the right to collect the freight, and if the defendants had refused to accept their orders in the matter, he was in a position to give immediate notice to the bill of lading holders to pay the freight to him or any agent named by him on behalf of the owners. There was a dispute whether Mr. Sanderson's letter was received by the defendants and read by Mr. Lamb before the interview which took place in the afternoon. Mr. Lamb stated that he did not in fact see it until the morning of February 11. In the judge's view it was not necessary to decide whether Mr. Lamb was right or wrong on this point. In the afternoon an interview took place between Mr. Sanderson and Mr. Lamb, at which the captain of the vessel was present, and at this interview Mr. Sanderson repeated his demand that the defendants should collect the freight on owners' account. There was some discussion about the amount of the disbursements that had been made by the defendants, but the evidence failed to satisfy the judge that Mr. Sanderson agreed that the

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defendants should have the right to deduct their disbursements from the freight. Mr. Sanderson did not say anything to justify Mr. Lamb in concluding that he was giving up any of the owners' rights, whatever they might be, but it may well have been that his mind at the time was not clear on the question whether the defendants, apart from any agreement by him, had a right to deduct their disbursements from the freight. At the interview Mr. Lamb agreed that the defendants would collect the freight on behalf of the owners and promised to confirm the same in writing. This he did by letter of February 10. The greater part of the goods on which freight was payable was discharged from the vessel on February 10. No freight was paid until the morning of February 11. Having received the freight the defendants wrote the letter on February 11 in which they said that the freight would be absorbed by their disbursements, and they refused to discharge the balance of the cargo pending definite instructions from the plaintiffs to discharge at their expense. Instructions to this effect were afterwards reluctantly given.

Sir Robert Aske for the plaintiffs.
Le Quesne K.C. and *Pritt* for the defendants.

Cur. adv. vult.

Dec. 21. GREER J. read his judgment, which after stating the facts continued as follows: The plaintiffs claimed that they were entitled to the freight, inasmuch as it was received by the defendants after they had received notice of the plaintiffs' claim and after they had accepted the plaintiffs' instructions to collect it for the plaintiffs, and they relied on *Wehner* v. *Dene Steam Shipping Co.* (1) The answer of the defendants was: (1.) that they only received the freight for the plaintiffs subject to a promise that the defendants would be entitled to deduct their disbursements; (2.) that the freight could only be effectively claimed by the owners by notice to the persons liable to pay, before payment, and that therefore when the money reached their hands it

(1) [1905] 2 K. B. 92.

was money of the charterers on which they could exercise a lien, or, in any event, against which they had an effective set-off, and they relied on *Tagart, Beaton & Co.* v. *Fisher & Sons* (1); and (3.) that before the intervention of the plaintiffs they themselves had a lien upon the freight which was available against the owners.

In my judgment none of the defendants' contentions affords a valid answer to the plaintiffs' claim. (1.) As already stated, I find that there was no agreement by Mr. Sanderson that the defendants should be entitled to deduct from the freight the amount of their disbursements. (2.) It might be sufficient in answer to the defendants' second contention to say that as they accepted the plaintiffs' instructions to collect the freight for them, and at the time they received it had not given notice to determine their agency, they did in fact receive the money as the plaintiffs' agents, and must account to them for it. But it seems desirable also to consider and answer the question, whether notice from the shipowners to the agents was or was not of itself sufficient to entitle the owners to the money received for freight after receipt of the notice. If the decision in *Wehner* v. *Dene Steam Shipping Co.* (2) is correct, it follows that in every case where bill of lading freight is received by the agent nominated by the charterers the shipowner can intervene and claim the freight in the hands of the agent as his money. That he can intervene successfully before receipt of the freight by the agent seems to me to be the necessary consequence of holding as Channell J. did in the case cited, that the bill of lading contract is a contract between the shipowner and the shipper, and not a contract between the charterers and the shipper. If this be so, the legal right to the freight is in the owner and not in the charterer, and the former can intervene at any time before the agent has received the freight, and say to him, "I am no longer content that the charterer should collect the freight. If you collect it at all, you must collect it for me." If the agent then collects the freight, it follows that the shipowner can sue

(1) [1903] 1 K. B. 391. (2) [1905] 2 K. B. 92.

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for it as money had and received. The judgment in *Wehner* v. *Dene Steam Shipping Co.* (1) goes beyond this, in that it decides that the agent must account for bill of lading freight received by him before notice of the owner's demand that it should be paid to the owner. In so far as the case so decided it seems difficult to reconcile the decision with that of the Court of Appeal in *Tagart, Beaton & Co.* v. *Fisher & Sons.* (2) In that case the plaintiffs, who stood in the shoes of the time charterers, were held entitled to the freight received by the agent appointed by the charterers before they had notice that the owners claimed the freight. The material facts in *Tagart, Beaton & Co.* v. *Fisher & Sons* (2) are distinguishable from the material facts in *Wehner* v. *Dene Steam Shipping Co.* (1) in one respect only. In *Tagart, Beaton & Co.* v. *Fisher & Sons* (2) the bill of lading was made out to the charterers, and as between the charterers and the owners it operated not as a contract but as a receipt for the goods. There was therefore no bill of lading contract made on shipment. The only contractual document was the charterparty. The freight payable by the consignee was not payable to the shipowner by virtue of a contract to which the latter was a party; he could only become entitled to it under the clause of the charterparty giving him a lien on sub-freights, or by some new contract, if such could be found, between him and the receiver of the cargo. It would therefore be too late for him to exercise his right to a lien after the freight had been received by the charterers personally or by their agents. Though Channell J. bases his judgment in *Wehner* v. *Dene Steam Shipping Co.* (1) on the fact that the bill of lading contract is with the owner, and therefore the owner in claiming the freight was only claiming what was legally his, he still speaks of the owner's rights as arising out of his lien. It is difficult to understand how a shipowner can be said to have a lien on that which, ex hypothesi, is his own property, and which he is entitled to because it is his own. A lien is a claim by a person in possession of the property of another who has the right to

(1) [1905] 2 K. B. 92. (2) [1903] 1 K. B. 391.

keep possession until the owner pays the debt in respect of which the possessor is entitled to the lien. It seems a misuse of words to say that a shipowner has a lien on the debt due to him under the contract made with him by the bill of lading. The lien clause in the charterparty is needed to give the owner a lien in those cases where the sub-freight is due to the charterer and not to the owner, as where goods are carried on a sub-charter without any bill of lading. In such a case the owner could only become entitled to the sub-freight by virtue of the lien clause, and it would be too late to exercise this lien after the debt had been paid to and received by the charterer personally or through his agent. The actual decision in *Tagart, Beaton & Co.* v. *Fisher & Sons* (1) goes no further than this. It only governs a case where the shipowner is bound to rely on a lien, and does not affect the case where he can claim the freight as due to him on his bill of lading contract. Whether the owner in the latter event can claim the freight in the hands of an agent of the charterer after it has been received by such agent without notice of claim by the owner is a question which it is unnecessary to decide in the present case. Channell J. based his decision that the shipowner could recover on the ground that the charterer's agent was also, though appointed by the charterer, the agent of the shipowner. I do not think he intended by that to hold that in relation to the discharge he was the agent of the shipowner, but only that he received the freight as the shipowner's agent as well as the charterer's agent. Be this as it may, I think it is clear that the defendants in this case, in attending to the discharge of the ship, were acting solely for the charterers. In incurring the expenses in respect of which they claim a lien or set-off they were acting as the agents of the charterers. They were doing for the charterers what the charterers had undertaken to do by clause 3 of the charterparty. It may be that the agent appointed by the charterer is the owner's agent to receive the freight, and is therefore accountable to the owner for it until he has paid it over to the charterers. However this may be, he is in my

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judgment accountable to the owner if he has collected the freight after notice by the owner that the freight is to be so collected. There is nothing in my opinion inconsistent with this view in the decision of the Court of Appeal in *Tagart, Beaton & Co.* v. *Fisher & Sons* (1) The present case is distinguishable from that case in three respects: first, notice of claim was received by the agent before collection of the freight; secondly, the agents agreed to collect for the owner; and thirdly, here there was a bill of lading contract which vested the legal right to the bill of lading freight in the owner. The defendants' second point therefore fails.

It remains to consider the defendants' third point. In my judgment this point also fails. The agents' expenses were incurred in carrying out the charterers' obligations under clause 3 of the charterparty. Until they stopped the discharge on February 11 their only principals, so far as the discharge was concerned, were the charterers. They had not collected any freight for them, and if they had any rights of lien such rights could only affect any property of their principals which came into their possession. They had not reduced the freight into possession, and such rights as they had, if any, to look to the freight to reimburse them for the expenses they had incurred in doing for the charterers that which the charterers had undertaken to do, could give them no lien, equitable or otherwise, on the unpaid freight, the legal right to which was always, according to my finding, in the shipowners. The same considerations prevent them from setting off against the owners' claim the 40*l.* advanced to the captain. This they did on behalf of the charterers. Any advantage arising from that payment accrues to the charterers, and not to their agents. The only legal effect of the payment is to reduce the debt of the charterers to the owners.

The plaintiffs are entitled to judgment for the amount claimed, less the sum of 17*l.* 4*s.* 1*d.* to which the defendants are admittedly entitled for the expenses incurred in discharging

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the props that were discharged expressly on behalf of the plaintiffs after the defendants' letter of February 11.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Sanderson & Co.*

Solicitors for defendants: *Botterell & Roche, for Hearfield & Lambert, Hull.*

J. S. H.

K. B. D. 1926 *Nov.* 3.
C. A. 1927 *Feb.* 7.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

MITCHELL (INSPECTOR OF TAXES) *v.* B. W. NOBLE, LIMITED.

Revenue—Income Tax—Trade Profits—Deductions—Money wholly and exclusively laid out for the Purposes of Business—Payments to dismissed Servants—Income or Capital Expenditure—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 3.

A company, which carried on an insurance business, being desirous in the interests of its business of getting rid of one of its life directors, entered into an agreement with him, to which the remaining directors were parties, under which in consideration of a payment to him by the company of 19,200*l.* the director undertook to retire from the company, to sell and transfer the 300 1*l.* shares held by him in the company to the remaining directors at par, to surrender to the company certain participating notes in it, and to abandon all claims that he might have against the company, or its directors. The 19,200*l.* was payable in five annual instalments. The company having paid the first instalment of 5200*l.* sought to deduct it for income tax purposes from its profits in the year of payment as being money wholly and exclusively laid out for the purposes of the business. The Commissioners allowed the claim:—

Held (affirming the decision of Rowlatt J.), that inasmuch as the Commissioners had found that the directors were satisfied that in order to save the company from scandal it was necessary to get rid of the director and to pay him the sum in question, that sum must be regarded as money "wholly and exclusively laid out and expended for the purposes of the trade" of the company within the meaning of r. 3 of the Rules applicable to Cases I. and II. of Sch. D.

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Held, also, that as the payment was not made to secure an actual asset so as effectually to increase the capital of the company, but was made in order to enable the directors to carry on the business of the company as they had done in the past, unfettered by the presence of the retiring director, which might have a bad effect on the credit of the company, it must be treated as an income and not as a capital expenditure, and was deductible as such for income tax purposes.

CASE stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the above Commissioners held on July 11, 1924, for the purpose of hearing appeals, B. W. Noble, Ld., (hereinafter called "the company"), appealed against three assessments to income tax in the sum of 10,475*l.* for the year ending April 5, 1924, 7500*l.* for the year ending April 5, 1923, and 3411*l.* for the year ending April 5, 1922, made upon them in respect of the said years.

The facts according to the case stated were as follows :—

The company, which was a private company, was incorporated on December 11, 1916, for the following purposes (inter alia) :—

(*a*) To acquire and carry on the business of an insurance and reinsurance broker and agent previously carried on by Major B. W. Noble in London.

(*b*) To carry on business as fire, life, accident, third party, burglary, contingency, employers' liability, marine or any other insurance or reinsurance brokers and agents for and London managers of the business of any British, colonial or foreign insurance or reinsurance company and any other trade or business whatsoever which could, in the opinion of the Board, be advantageously carried on by the company in connection with or as ancillary to the general business of the company.

Under the articles of association of the company the first directors of the company were Major Noble, Mrs. Noble and C. E. Haylor. Major Noble was appointed chairman and managing director, and as such was entitled to preside at any general meeting of the company.

In the material period the company had issued 500

preference shares and 1000 ordinary shares of the nominal value of 1*l.* each. The preference shares, which were held, with the exception of one share, by Mrs. Noble, Major Noble's wife, did not carry with them any title to vote. The ordinary shares were, in the period, held as follows :—

Major B. W. Noble	500
C. E. Haylor	300
M. E. Gabus	200
	1000

The holders of these shares, of which Major Noble held half the total number issued, were entitled to vote at shareholders' meetings, and Major Noble as chairman, upon equal division of opinion among the shareholders, to a casting or deciding vote.

Under an agreement of November 25, 1918, made between the company and its directors—namely, Major Noble, his wife, Haylor and Gabus—it was provided (inter alia) that the directors should be directors for life so long as they should continue to hold a qualifying number of shares, subject to dismissal for misconduct as mentioned below. In the event of a director being dismissed the remaining directors were empowered to require him to sell to them his shares in the company at par. Further under this agreement, the salaries of the directors for the first year were fixed at 2000*l.* to Major Noble, 1750*l.* to Haylor and 1500*l.* to Gabus, and it was provided that although these figures might be varied from time to time, having regard to the profits of the company, the ratio should remain the same. It was also provided that if any director should (inter alia) neglect his duties or be guilty of such misconduct towards the company or otherwise as would in the absence of any agreement to the contrary entitle the company summarily to dismiss a director so offending from his employment, the company should have power to dismiss him forthwith, paying to him such a proportion of his salary only as should then be due. In the event of a director being so dismissed the remaining directors

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were empowered to require the director dismissed to sell his shares to them at par.

By a further agreement of April 29, 1920, made between the company, its directors and one Silver, a new director, the directors covenanted to alter the company's articles so as to enable the company to issue participating notes, and it was provided that as soon as this was done the company would create 2000 of the notes and allot 500 to Major Noble, 300 to Haylor, 200 to Gabus and 150 to Silver. These notes were to confer certain rights in profits, the material provision being that in each year the surplus profits of the company should be applied as follows: First, in payment of a dividend of 5*l.* per share on the ordinary shares of the company; half of the remaining profits to be divided rateably between the holders for the time being of the ordinary shares of the company, and the other half between the participating note holders in proportion to the number of notes held by them. It was provided that no persons other than a director, officer, servant, or employee of the company should be entitled to hold or acquire participating notes. It was also provided that when a note holder ceased to be a director, officer, servant or employee of the company, he should forthwith surrender his notes to the company to be cancelled. The necessary alterations in the articles were made and the notes were allotted as provided by the agreement.

During 1920 and 1921 considerable friction of a personal nature arose between Haylor and his co-directors, and there was, as the Commissioners stated, evidence before them of conduct on the part of Haylor improper in a director of the company. The other directors desired to get rid of him, and considered it necessary for the sake of the good name of the company to do so. It was admitted in evidence before the Commissioners that the company might possibly have been justified by law in exercising its power of dismissal, in which case Haylor would have been entitled to no compensation, but as the other directors were very anxious that the matter should not become public, and that a scandal affecting the reputation of the company should be avoided,

they entered into negotiations with Haylor for his retirement. He at first demanded 50,000*l.*, but a compromise was eventually arrived at, and on December 30, 1921, an agreement was entered into between the company, the remaining directors and Haylor, whereby Haylor agreed: (1.) to retire from the company; (2.) to transfer his shares, which at this time were 300 1*l.* shares, at their face value of 1*l.* per share to the remaining directors; and (3.) to surrender his participating notes. The company agreed to pay Haylor 19,200*l.* and the directors to pay him 300*l.*, making together the sum of 19,500*l.*, and Haylor agreed to accept that sum in satisfaction of all claims which he had or might have against the company or the directors. (The 300*l.* paid by the directors was expressed to be the consideration for his shares.) (Para. 9 of case.)

There were mutual covenants between Haylor and the remaining directors not to repeat accusations or insinuations of improper conduct.

It was given in evidence that these shares were in fact worth considerably more than their face value, but it was not possible to put an exact value upon them.

The issued capital of the company was 1000*l.*, and the dividends declared in the three years ended September, 1922, averaged about 677 per cent.

The above sum of 19,500*l.* was payable in five annual instalments. The first annual instalment (which was duly paid) amounted to 5500*l.*, and consisted of (*a*) the 300*l.* payable by the directors for Haylor's shares, and (*b*) 5200*l.*, being part of the 19,200*l.* payable by the company.

It was contended on behalf of the company (inter alia) that the said sum of 19,200*l.* payable to Haylor was money wholly and exclusively laid out for the purposes of the business, and that the instalments were admissible deductions from profits as and when they fell due.

It was contended on behalf of the Crown (inter alia): (1.) That assuming (which was denied) that the said sum of 19,200*l.* or any part thereof represented commutation or compensation for loss of salary to which Haylor would have

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continued to be entitled had he remained a director and which would have continued to be an admissible deduction year by year in arriving at the company's profits for assessment, the said sum of 19,200*l.* paid or payable as such commutation or compensation and each instalment thereof was a capital sum and was not an expense proper to be set against the receipts of the company on revenue account for the purpose of computing the balance of its profits.

(2.) That assuming (which was denied) that the said sum of 19,200*l.* or any part thereof represented compensation for loss of salary, it was a voluntary payment, inasmuch as in the circumstances the company was entitled to dismiss Haylor without compensation of any kind and was not under any obligation to continue to retain him in its service and pay him a salary. This was not therefore a commutation of any yearly sum which the company continued liable to pay.

(3.) That the agreement to pay the sum of 19,200*l.* was a compromise of a claim for 50,000*l.*, and if any part of this sum represented compensation for loss of salary (which was denied) the payment represented not only compensation for such loss, but also generally compensation for loss of anticipated dividends as a shareholder and of surplus profits as a note holder, neither of which matters could in any circumstances be the subject of deduction in arriving at the company's profits for assessment. The agreement of December 30, 1921, did not attempt to apportion the 19,200*l.* as between compensation for loss of anticipated dividends and surplus profits on the one hand and loss of salary on the other hand, and there was no evidence upon which the Commissioners could find that any particular sum was in fact payable or paid as compensation for loss of salary or by way of commutation of any payment which had it continued to be made year by year would have been an admissible deduction in arriving at the company's profits for assessment.

(4.) That in essence the sum of 19,200*l.* was domestic expenditure incurred for the purpose of buying out a director and shareholder for purely personal reasons, and was not

an expenditure incurred for the purpose of earning profits of the company.

(5.) That neither the said sum of 19,200*l.* nor the said instalment of 5200*l.* nor any other instalment thereof was money wholly and exclusively laid out or expended for the purpose of the company's business.

(6.) That neither the said sum of 19,200*l.* nor the said instalment of 5200*l.* nor any other instalment thereof was admissible as a deduction in computing the profits of the company for assessment to income tax.

The Commissioners held (inter alia) that the instalment of 5200*l.* paid to Haylor should be allowed as a business expense; and as a result they reduced the assessment for 1923–24 to 6254*l.*, and reduced the assessment for 1922–23 to 5496*l.*, and they confirmed the assessment for 1921–22 in the sum of 3411*l.* At the request of the Crown the Commissioners stated this case for the opinion of the Court.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the Crown.

Konstam K.C., *Le Quesne K.C.* and *Merlin* for the respondents.

ROWLATT J. In this case the question is whether there can be deducted in arriving at the profits of the company, as an expense of carrying on the trade, an instalment paid in the year in question on account of the very large sum which was payable to this outgoing director, Mr. Haylor, under the terms of the agreement.

It was said (and perhaps this is the clearest as well as the most authoritative statement on the point), in *British Insulated and Helsby Cables, Ld.* v. *Atherton* (1), by the Lord Chancellor that "a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade." It is only made

(1) [1926] A. C. 205, 212.

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voluntarily, it may be, but it is under that sort of description that this was said to be an expense incurred wholly and exclusively for the purposes of the trade.

The other point is whether it was capital expenditure. This point as to the deductibility of a payment made upon the termination of a person's employment was glanced at in the House of Lords in *Royal Insurance Co.* v. *Watson.* (1) Lord Herschell reserved his opinion upon it without expressing any view. Lord Shand said that he thought damages paid to a dismissed servant—and I suppose he would include a sum paid by way of agreement to get rid of a claim for damages—might be a deductible expense. I think that in the ordinary case a payment to get rid of a servant, when it was not expedient to keep him in the interests of the trade, would be deductible expense: I leave out of consideration for the moment special cases, as when a servant is dismissed on the ground of a purely personal quarrel, although his staying on would not affect the trade at all. But it seems to me that a payment to get rid of a servant in the interests of the trade is a proper deduction. A person who carries on a trade has to employ an efficient staff, and he has to employ a staff that will prove satisfactory to the customers of the trade. He has also to cease from employing an inefficient staff and a staff that does not get on with the customers of the trade; and if he has to pay for that cessation, it seems to me that there is no reason why that should not be an expense incurred for the purposes of the trade. He has to facilitate people going when they reach the age of retirement, in their own interests and in the interests of their employer. He has to hold that prospect out to them. If he has not held out the prospect, at least he has to deal with the situation and provide in some way, as Lord Cave says, "on the grounds of commercial expediency," for people who may have to leave his employment.

I do not think that payments of that kind are like the loss in *Strong & Co.* v. *Woodifield.* (2) Damages had there been recovered for an accident which had happened in the house;

(1) [1897] A. C. 1, 8. (2) [1906] A. C. 448.

but if, without the verdict of a jury, a payment had been made, I take it that would have been upon the same footing. It was near the line, I daresay, and Lord James of Hereford obviously thought so, but it was an expense collateral to the actual trade. But where the expense is connected with the keeping of an adequate staff, who earn the profits of the trade by their labours, it seems to me that that is not within the principle of *Strong & Co.* v. *Woodifield.* (1)

I should not have much difficulty if this were a question of paying a month's wages or six months' wages in lieu of notice to an employee, who from the business point of view could not possibly be retained by the employers, because he was turning away custom. But here we have very special facts and very big figures, and the question is whether there is anything in these facts that makes a difference. What was the position? This director had a substantial salary, and the normal measure would be the loss of his salary, subject to a discount on the ordinary principle, in consideration of the fact that he might be out of employment. But there was this peculiarity: that if he was dismissed, he had to sell his extraordinarily valuable shares, which paid 677 per cent. dividend at par, and he also had to surrender some valuable profit sharing notes which he held. Therefore he was in a position to say, "I am not going to be dismissed on a calculation of the salary I lose, because the measure of my damages must include the loss of the premium value of my shares and the loss of my profit sharing certificates." Therefore the company had to pay a much larger sum. They paid it because it was essential in their opinion, as the case finds, to get rid of him for the sake of the good name of the company, and they did not want any litigation or publicity or any scandal or anything of that kind, so they paid it for business reasons. It seems to me that they paid all this sum—although the circumstances are very peculiar—simply to get rid of the director. These other items came in, but they only came in as enhancing the measure of the claim which they had to deal with.

(1) [1906] A. C. 448.

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It is true that in the agreement it is said that he agreed with the company to transfer the shares at their face value to his co-directors and that he undertook to surrender his profit sharing notes to the company or as they should direct; but I think that is only putting into the agreement the obligation upon him, as he was being paid in respect of those heads of damage, that he would deal with them on the footing which formed the basis of his payment—namely, that he should part with these pieces of property. I do not think it can be said that there are two parts in this payment: Firstly, a compensation for the loss of his salary, and secondly, a buying of the shares and of the profit sharing notes. I think the whole sum was a sum paid to him to induce him to go—to get rid of him, in other words. Therefore it seems to me that this was a business expense.

Now comes the question whether it was a capital expense. I do not think the cases in which the question of a lump sum payment to avoid a recurring business expense have anything to do with this case. There is no question here of a recurring business expense or payment of a capital sum to get rid of it. I do not think that it can successfully be argued on that ground that this is not a capital expense. But is it a capital expense on any ground? As Lord Cave points out in *British Insulated and Helsby Cables, Ld.* v. *Atherton* (1) it is a capital expense if you buy an asset or purchase an enduring advantage. This was not that case, or anything like it. What it is more like, perhaps, is the case of a payment made to remove the possibility of a recurring disadvantage. If a business is being carried on under circumstances affecting its property, as a business carried on under circumstances which concern the silting up of a channel, or on premises which involve continual trouble and expense, and a payment is made to put the premises on a different footing, that is a capital expenditure. There the persons carrying on the business say to themselves: "Instead of having this silting channel, we will have a concrete channel, in which there will be no silting at all."

(1) [1926] A. C. 205.

If you say, "I will not have a railing which perpetually falls down or wants repainting; I will abolish it and I will build a brick wall which will not fall down or will not want painting," that is a capital expenditure. But I do not see how that can be said in this case. This gentleman being there as an unsatisfactory servant was not a permanency. He was no doubt there for his life, but I do not think you can say: "By an expenditure of capital I will get rid of this nuisance affecting my business, and have his room rather than his company by making this capital expenditure." I cannot look at it in that way. It seems to me it is simply this, although the largeness of the figures and the peculiar nature of the circumstances perplex one, that this is no more than a payment to get rid of a servant in the course of the business and in the year in which the trouble comes. I do not think it is a capital expense, and I have already held that it is an expense incurred in the conduct of the business. Therefore I am unable to differ from the Commissioners, and this appeal fails.

F. P. F.

The Crown appealed. The appeal was heard on February 7, 1927.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the appellant. The sole point on this appeal is whether the payment of the 19,200*l.* to the director to induce him to retire from the company and surrender his shares and participating notes can be treated as a revenue expense in the year of assessment. The Commissioners have held it was a "business expense" and Rowlatt J. has upheld their decision. The finding that this payment was a business expense is not, it is submitted, sufficient to bring the case within r. 3 of the Rules applicable to Cases I. and II. of Sch. D entitling the company to deduction. The Commissioners have not really applied their minds to what was the true criterion in the case. The question the Court has here to consider is one affecting the trading of the company and not one as between the directors which has no bearing on the trading of the company.

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[LORD HANWORTH M.R. You must not overlook the fact that the directors thought it was necessary for the good name of the company to get rid of this director.]

He was not dismissed for misconduct. One of the objects of the payment was to procure the transfer by him to the other directors of his 300 shares and to compensate him for his loss of dividend upon them. If the director had died the shares would have been assets of his estate, and if they had been sold to the other directors it could not then have been contended that the money paid for their purchase was expended for the benefit of the company. Payment of damages in a case like the present is not money expended "for the purposes of the trade": *Strong & Co.* v. *Woodifield.* (1) It does not follow that because a payment is called a trade expense that it is necessarily deductible, nor is it deductible, where it is for something which is wholly for the future benefit of the business. In the present case the expense was not solely for the purposes of the business; it was also for the purpose of enabling the directors to get the shares at par value, which was considerably less than their real value.

But assuming that the expenditure was a business expense, it is submitted that it was a capital and not a revenue expense and therefore not deductible: *Coltness Iron Co.* v. *Black* (2); *Vallambrosa Rubber Co.* v. *Farmer.* (3) The probability of recurrence of the expense has always been treated as a valuable test. *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (4) is distinguishable from this case on the ground that it was there found that it was customary for the Council to pay their reporters a lump sum on retirement. See also *Union Cold Storage Co.* v. *Jones* (5), where the expenditure, although a proper one, was held to be too remote for income tax purposes; *Ounsworth* v. *Vickers, Ld.* (6); and *British Insulated and Helsby Cables, Ld.* v. *Atherton.* (7)

(1) [1906] A. C. 448, 453.
(2) (1881) 1 Tax Cas. 287, 307.
(3) (1910) 5 Tax Cas. 529, 535.
(4) [1914] 3 K. B. 674.
(5) (1924) 8 Tax Cas. 725.
(6) [1915] 3 K. B. 267, 273.
(7) [1926] A. C. 205; [1925] 1 K. B. 421.

Here the payment was made for the whole period of the life of the company. It was to secure the permanent freedom of the company from a nuisance. The view of the Crown on the facts is that here was a life director whose conduct affected the life of the company, and the company had to get rid of him. It was not like the case of the dismissal of a servant. The paying out of a life director was something quite outside the carrying on of the business of the company. The director was in a position to make terms with the directors, and he did so, and the whole of the 19,200*l.* was paid to him by the company in order to induce him to transfer his shares to the other directors. There is no trace here that any part of this money was paid to the director in respect of his past services in carrying on the business of the company. It is submitted therefore that this sum was not "wholly and exclusively laid out or expended for the purpose of the trade" of the company within r. 3.

Konstam K.C., *Le Quesne K.C.* and *Merlin* for the respondents were not called upon to argue.

LORD HANWORTH M.R. This is a case which raises, first, a point discussed in a number of cases, whether or not a deduction can be made within r. 3 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act of 1918, that is to say, as being a sum "wholly and exclusively laid out or expended for the purposes of the trade"; secondly, the question whether if it is so wholly and exclusively laid out, it is to be attributed to capital or to income.

Now I need not recount the whole of the facts which are set out in the Case. The company was in its nature a private company, and the business carried on by it was that of insurance brokers and reinsurance brokers. It was a company which had business both in London and Paris, and the special circumstances of the holding of the capital and the original issue of the notes which are provided for under the agreement to which our attention has been called, offer somewhat unusual features which are peculiar to this present company. It was able, however, by reason of the standing which it had

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acquired and the personal attributes of its directors, to do a large business with a very small capital which resulted in very large dividends. In the year 1921 disputes arose with a particular director. That director was a shareholder, and he was in a position, even if he had been removed from his directorship, still to hold his shares. The charge against him was that he had been guilty of conduct which would have brought him within clause 18 of the agreement of November 25, 1918. That clause provided that if a director should commit an act of bankruptcy or compound with his creditors or be guilty of such misconduct towards the company or otherwise as would in the absence of an agreement to the contrary entitle the company to summarily dismiss a director so offending from his employment, the company should have power to dismiss him forthwith, paying to him such a proportion of his salary as should then be due. Then a provision was made whereby the clause could be put in force; and further, under clause 19, within one calendar month of the director being dismissed from his employment under the provisions of clause 18 to which I have just referred, either or both of the remaining parties—that is, the other directors—should be at liberty to give to the party so dismissed notice in writing requiring him within seven days to sell at par and transfer to the remaining parties, either in equal shares or such shares and proportions as they should in writing direct, the whole of the shares in the company then held by the party so dismissed.

In 1920 disputes arose with this director, who was the holder of a certain number of shares, and it was alleged against him by his colleagues that he had in fact been guilty of conduct which would have brought into operation that clause 18, with the consequent rights which would have inured to them of being able to demand that he should hand over the shares under clause 19. Para. 9 of the Case finds that upon this situation having arisen "the other directors desired to get rid of him and considered it necessary for the sake of the good name of the company to do so. It was admitted in evidence before us (the Commissioners) that the company

might possibly have been justified by law in exercising its powers of dismissal, but as the other directors were very anxious that the matter should not become public, and that a scandal affecting the reputation of the company should be avoided, they entered into negotiations with this director for his retirement," and ultimately terms were agreed upon. The effect of that agreement was shortly this, that with reference to his shares in respect of which a demand could have been made under clause 19 if he had been guilty under clause 18, those shares were transferred at face value to his colleagues; but this director was not minded to admit that he had been guilty of conduct which enabled his colleagues to put in force clause 18; he was, however, prepared to negotiate, and no doubt the fact was that he was in a strong position. Now this is a company which was doing a very good business indeed; it is a business, however, to which good faith, standing and credit are essential, and we must by no means overlook the findings of the Commissioners that the other directors considered it necessary for the sake of the good name of the company to get rid of this director, and they also were bona fide satisfied that if possible they ought to avoid a scandal affecting the reputation of the company, for both those objects were objects which were of deep importance to the company. The company's immediate as well as future interests were concerned in the way in which the directors handled that situation. The directors had to deal with a difficult problem, and their attitude being that which I have already recounted, it seemed right to them to make an agreement with this director which should prevent scandal, free the company from the serious position in which the continuance of this director as a director would have placed it, and enable the company to maintain its good name and its good business. By the agreement, therefore, which was made on December 30, 1921, apart from the term whereby the other directors were to buy his shares, it was agreed that the company should pay to this director a sum of 19,200*l.*, and this total was the agreed sum settled between the parties, but this payment was to be by

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instalments over a period of four years; there was to be an immediate payment of 5200*l.*, and for the rest there were to be four payments of 3500*l.* successively year by year.

Now it is contended, first, that this sum of 19,200*l.* is not money wholly and exclusively laid out or expended for the purposes of the trade within the meaning of r. 3. The Commissioners, after they had found the facts to which I have referred, held that it was "a business expense," and they allowed the deduction. I think, first, that we must interpret that phrase of the Commissioners as meaning this, that the expense was incurred for the benefit of and in relation to the carrying on of the business of the company; and after looking at their findings in para. 9 I can well understand their reaching that conclusion. Secondly, I think that the observation of my learned colleague is well founded: that they did in fact allow the deduction, with the result that what they intended to do was to show that in treating it as a business expense they meant to find, so far as it was a question of fact, that it was a disbursement or expense wholly and exclusively laid out or expended for the purposes of the trade. Mr. Hills, however, is quite right in saying that the mere finding of fact would not be sufficient unless it was possible for an expense of this kind to have attributed to it the necessary characteristics which are required in order that in law it may be a deduction. By this rule no deductions are to be made unless the requirement of r. 3 (*a*), which I have already read, is fulfilled, and also no deduction can be made under r. 3 (*f*) in respect of capital withdrawn from the trade.

Now upon the first point, whether or not this sum was a disbursement or expense wholly and exclusively laid out or expended for the purposes of the trade, it appears to me that so far as the question of fact can be found, there is a definite finding of the Commissioners that it was so; and as to whether or not they could or were entitled to find that it was an expenditure for the purposes of the trade, I agree with Rowlatt J. that the words used by Lord Cave L.C. in his speech in *British Insulated and Helsby Cables, Ld.* v.

Atherton (1) are germane to this decision. He there said: "It was made clear in the above cited cases of *Usher's Wiltshire Brewery* v. *Bruce* (2) and *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (3) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of business, may yet be expended wholly and exclusively for the purposes of the trade." If I may respectfully say so, I think the authorities cited by the Lord Chancellor clearly point to that being a compendious summary of the effect of them. When I look at those words and apply them to the facts of this case, it appears to me that once there was a finding that the co-directors were minded in doing what they did to save their trade from a scandal—being satisfied that it was not possible to retain this director as a director—and that it was in the interests of the good name of the company to get rid of him, one must hold first of all that this is a sum expended by the company, for it was in relation to the company and his conduct towards the company that clause 18 might have been applied and might have been contested. Further I think it is plain that within r. 3 (*a*) this sum ought to be allowed to be deducted as an expense for the purposes of the trade. Applying another and an older test, which is laid down in *Strong & Co.* v. *Woodifield* (4) by Lord Loreburn, where he says: "I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself," or the words of Lord Davey (5): "These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc." I think the same result follows. It seems to me that the directors had to handle a situation of both delicacy and gravity, and their bona fides not being

(1) [1926] A. C. 205, 211.
(2) [1915] A. C. 433.
(3) [1914] 3 K. B. 674.
(4) [1906] A. C. 448, 452.
(5) [1906] A. C. 453.

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questioned, it is clear that they took a course which they were justified in taking and made a payment in the interests of the carrying on of their trade.

That being so, the second question arises: Is the expense to be treated as a capital expense? It is said, and not unfairly, that you have here a sum definitely agreed upon, payable no doubt by instalments, but for all practical purposes the sum is immediately ascertained and is in that sense in the nature of a capital payment, liquidated though it may be over a subsequent period of time; and that for this payment they obtained an immediate result—namely, the resignation of the director. It was not a recurring incident; it was not something which would have to be dealt with in subsequent years, but it had an immediate result final in its consequences, inasmuch as it severed the connection between the director and the company. All that is very true, and I agree that perhaps it is more difficult to see whether or not it should be treated as a capital payment, but I think Rowlatt J. puts it well at the end of his judgment where he says: "This gentleman being there as an unsatisfactory servant was not a permanency. He was no doubt there for his life, but I do not think you can say: 'By that expenditure of capital I will get rid of this nuisance affecting my business, and have his room rather than his company by making this capital expenditure.' I cannot look at it in that way. It seems to me it is simply this, although the largeness of the figures and the peculiar nature of the circumstances perplex me, that this is no more than a payment to get rid of a servant in the course of the business and in the year in which the trouble comes."

We have had a number of cases reviewed again which were discussed and considered in this Court and in the House of Lords in *British Insulated and Helsby Cables, Ld.* v. *Atherton* (1), in which the Lord Chancellor gives instances of payments which, although apparently final in their quality, were held to be properly chargeable against the receipts

(1) [1925] 1 K. B. 421; [1926] A. C. 205.

for the year. "Instances," he says (1), "of such payments may be found in the gratuity of 1500*l.* paid to a reporter on his retirement, which was the subject of the decision in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (2), and in the expenditure of 4994*l.* in the purchase of an annuity for the benefit of an actuary who had retired, which, in *Hancock* v. *General Reversionary and Investment Co.* (3), was allowed, and I think rightly allowed, to be deducted from profits." I respectfully share the view of Lord Buckmaster that it is not easy to find much help from the particular facts of decided cases; nor is it easy to define the limits of the principle upon which one is acting. At the same time I think in a concrete case it is possible to determine whether an expenditure is a capital expenditure or rightly to be attributed to revenue.

I do not in the least wish to go back upon anything I said myself in the *British Insulated and Helsby Cables* case (4), but it appears to me, upon the facts of this case, that this payment should be treated as a revenue item and not as a capital item. It seems to attain more closely to the payments in *Hancock's* case (3) and *Smith's* case (2) than to those in the other cases such as *Ounsworth* v. *Vickers, Ld.* (5), and the *British Insulated and Helsby Cables* case (4) itself. It was a payment made in the course of business, with reference to a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company but to enable the company to continue to carry on, as it had done in the past, the same type and high quality of business, unfettered and unimperilled by the presence of one who, if the public had known about his position, might have caused difficulty in its business and whom it was necessary to deal and settle with at once.

For these reasons it appears to me that on the second point Rowlatt J. was also right. I agree therefore with his

(1) [1926] A. C. 205, 213.
(2) [1914] 3 K. B. 674.
(3) [1919] 1 K. B. 25.
(4) [1926] A. C. 205.
(5) [1915] 3 K. B. 267.

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reasoning and his conclusions, and I think the appeal must be dismissed with costs.

SARGANT L.J. I am of the same opinion. So far as the questions of fact are concerned, the decision of the Commissioners is in favour of the taxpayer here; but, of course, the decision in a case of this kind is not conclusive, because it is obvious that questions of law as well as of fact arise in determining whether or not such a payment as this is brought within the permissible deductions allowed under the Income Tax Acts.

Now, first, as to the question whether this was a disbursement wholly and exclusively laid out or expended for the purposes of the trade, it seems to me that there is nothing at all to show that it was not so exclusively laid out. The object, as disclosed by para. 9 of the Case, was that of preserving the status and reputation of the company, which the directors felt would be somewhat imperilled by the other director remaining in the business or by a dismissal of him against his will, involving proceedings by way of action in which the good name of the company might suffer. To avoid that and to preserve the status and dividend earning power of the company seems to me a purpose which is well within the ordinary purposes of the trade, profession or vocation of the company. A good deal of stress was laid upon this, that the individual directors were enabled to purchase at par shares in respect of which a very large dividend was being earned, but it is to be noted that that is only precisely what they would have been entitled to do if the director had been in fact dismissed under clause 18; they would have been entitled to get his shares under clause 19. Beyond that, it appears to me that in a company of this kind it was absolutely necessary that if a director did leave the service of the company, his shares should be transferred to the remaining directors of the company. The constitution of the company, which was substantially a private company, showed that it was recognized that the very small capital—very small in proportion to the earning power of

the company—should be held, and held exclusively by those who had the direction and management of the company. Again, the mere fact that this very large dividend would be earned for the directors on the shares so transferred does not appear to me in any way conclusive or tending against them, for this reason, that they, if they were to get these dividends, would obtain those results through the prosperity of the company as a whole. It was only as an incidental or secondary result of the prosperity of the whole company that their shares, and the participating notes, would result in large profits for them, and therefore, although that might be the result, none the less, as it was a secondary result and only followed upon the prosperity of the whole company, a payment to ensure the prosperity of the whole company was not, in my judgment, in any way tarnished or rendered suspicious by the fact that it would ultimately enure in a secondary sense for the benefit of those who remained the directors and managers of the company.

Then comes the next point: whether this very large payment was so exceptional in its nature that it must be considered as a capital payment and not as a payment by way of deduction from annual outgoings. With regard to that I entirely agree with the view of the learned judge in the Court below, that the dismissal of a servant, or compensation paid to ensure the dismissal of a servant (which, of course, this director was—a servant of the company), is a payment which would in the ordinary course be attributed to the year in which the payment was made, and I see no reason for thinking in this case that it was of the nature of a capital expenditure. A situation of this sort is, unfortunately, liable to recur; I hope it may not recur in the annals of this company; but by making the payment it has in no way ensured that such an event shall not occur in the future, any more than in the case of any other company. I am a little struck with this, a circumstance which I think was noted in the dissenting judgments, both of Lord Carson and Lord Blanesburgh in the case to which so much reference has been made, that it is impossible to say to what capital

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account of the company you could possibly attribute this payment. It is quite impossible to put against the capital account of the company, as I conceive it, a payment of this nature. It seems to me that the payment, though large and though exceptional, was not of such a nature; it certainly was not capital withdrawn from the company, or any sum employed or intended to be employed as capital in the business. It was a payment which as a matter of fact was made out of the profits of the company, apparently, as to the 5200*l.*, in the year in which it was paid, and, as to the future payments, they will have to be made out of the profits of the year in which those payments will have to be made. To my mind, it is essentially different from those various payments in the cases which have been referred to, which were of the nature of adding to or improving the equipment, or otherwise made for the permanent benefit of the company.

Mr. Hills spoke throughout of the directorship of the director who was dismissed as being for life, but I think that really is to miss the point. He was to be a director for life unless he was dismissed; and it was because the other directors thought he was liable to be dismissed and were seeking to dismiss him, and therefore to make his office a much more temporary office than an office for life, that the whole of this question arose and that this payment had to be made.

In my judgment the learned judge was right on both points, and the appeal should be dismissed.

LAWRENCE L.J. I agree that the sum in question was wholly and exclusively expended by the company for the purpose of its business, in the sense that the sole object with which the company made the payment was to enable the company to continue to carry on and earn profits in its business.

On the question whether the payment is a capital expenditure or a revenue expenditure (a point upon which there is no express finding by the Commissioners) I confess

to having entertained doubts, which are not yet wholly resolved. I am not fully convinced that the payment was not made to secure an advantage for "the enduring benefit of trade" within the meaning of that expression used by Viscount Cave L.C. in the *British Insulated and Helsby Cables* case. (1) As, however, both the Master of the Rolls and Sargant L.J. have arrived at the definite conclusion that the sum was a revenue expenditure, and as my doubts are not strong enough to cause me to dissent from the judgments just delivered, I do not think that any useful purpose would be served by hearing counsel for the respondents. I therefore concur in dismissing the appeal.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for company: *Ashley, Tee & Sons.*

W. I. C.

[IN THE COURT OF APPEAL.]

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PUTSMAN *v.* TAYLOR.

Restraint of Trade—Contract of Service—Reasonableness.

Appeal from the decision of the Divisional Court, reported [1927] 1 K. B. 637, dismissed on the construction of the covenant as a whole without discussing the question of its severability.

APPEAL from a decision of the Divisional Court (see headnote).

The plaintiff, a tailor, carried on business in Birmingham in three places, Snow Hill, Bristol Road and Aston Cross. The defendant before 1925 was in the employment of a brother in law of the plaintiff, a neighbouring trade rival. In March, 1925, the defendant entered the plaintiff's service as manager and cutter for twelve months certain, and thereafter the employment was to be terminable by one week's notice on either side. By clause 11 of the agreement of

(1) [1926] A. C. 205, 213.

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service the defendant agreed that "after the determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer, or be employed by Dresdens, tailors, or be employed in any capacity by any person, firm or company carrying on a business similar to that of the employer in Snow Hill, Birmingham, or within a half-mile radius of Aston Cross or Bristol Road, Birmingham." At the end of fifteen months the defendant left the plaintiff's service and entered that of Joe Putsman, a brother of the plaintiff, who carried on a tailor's business in Snow Hill. The plaintiff claimed an injunction in the county court in terms of clause 11, and, alternatively, an injunction restraining the defendant for a period of five years from being employed in Snow Hill in any capacity by any person, firm or company in a business similar to that of the plaintiff.

The county court judge refused an injunction in the terms of the whole clause of the agreement. He held that the promise not to take service for five years with any tailor in Snow Hill was a promise which might properly be enforced as a separate promise, if it were a valid promise, but that it was invalid as being in undue restraint of trade.

On appeal by the plaintiff, the Divisional Court, without discussing the validity of clause 11 as a whole, held that the defendant's promises were independent and severable, and that the plaintiff was entitled to an injunction restraining the defendant for a period of five years from the determination of the agreement from being employed in Snow Hill in any capacity by any person, firm or company carrying on a business similar to that of the plaintiff.

The defendant appealed.

Bosanquet K.C. and *C. R. Williams* for the appellant.
R. A. Willes for the respondent.

The Court (BANKES and SARGANT L.JJ. and AVORY J.) held that it was unnecessary to consider the question of the

severability of clause 11 of the agreement, inasmuch as, in their opinion, that clause when read as a whole, and properly construed, was limited as regards time and space, and was not in the circumstances—in particular the circumstance that the defendant was well known in Birmingham as an experienced cutter—an unreasonable protection for the plaintiff to require.

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Appeal dismissed.

Solicitors for appellant: *Stibbard, Gibson & Co.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for James, Barton & Kentish, Birmingham.*

J. S. H.

[IN THE COURT OF APPEAL.]

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A. E. REED AND COMPANY, LIMITED *v.* PAGE, SON AND EAST, LIMITED, AND ANOTHER.

[1926. A. 995.]

Shipping—Lighterage—Barge overloaded—Unseaworthiness—Loaded Barge sinking while waiting in River for Tug.

The plaintiffs, who were the consignees of 500 tons of wood pulp which arrived at Erith by steamer, employed lightermen to provide barges for the collection of that consignment from the steamer and to lighter it to Nine Elms. The lightermen sent to Erith three barges for this purpose, one of which, the *Jellicoe*, had a carrying capacity of 170 tons and no more. When the loading commenced, the *Jellicoe* was seaworthy, but 190 tons were put on board, and after the loading was finished and while she was lying with that cargo on board alongside the steamer waiting for a tug to tow her to Nine Elms she sank, and her cargo was lost. At the trial of an action by the plaintiffs against the lightermen in respect of the loss, Roche J. found that by reason of being overloaded the *Jellicoe* was unseaworthy and he gave judgment against the lightermen, holding that the London Lighterage Clause, which formed part of the contract and upon which they relied, did not protect them from liability for loss due to unseaworthiness. On appeal:—

Held, that when the loading of the *Jellicoe* was finished, a new stage of the employment or adventure commenced, and as at that stage the *Jellicoe* was, by reason of being overloaded, unseaworthy either to lie

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in the river or to be towed, the lightermen were liable, as the London Lighterage Clause did not cover a loss due to unseaworthiness.

Decision of Roche J. affirmed.

McFadden v. *Blue Star Line* [1905] 1 K. B. 697 and *Wade* v. *Cockerlin* (1905) 10 Com. Cas. 115 considered.

Appeal from the decision of Roche J.

The plaintiffs, who were the consignees of 500 tons of wood pulp which arrived at Erith Buoys in the steamship *Borgholm*, employed the first defendants in December, 1925, to provide barges for the collection of that consignment from the steamer at Erith and to lighter the same to Nine Elms upon a journey to Farncombe. For this purpose the lightermen sent to Erith three barges, one of which was the *Jellicoe*, which had a carrying capacity of 170 tons and no more. The lightermen employed a stevedore, the second defendant, to discharge and stow the cargo. An excessive load, namely, 190 tons, was in fact put on board the *Jellicoe*, and while she was lying alongside the steamer with this load on board, waiting for a tug to tow her to Nine Elms, she sank and her cargo was lost.

The plaintiffs sued both lightermen and stevedore for damages for the loss of the cargo which was on board the *Jellicoe*. As against the lightermen the plaintiffs alleged that the barge was unseaworthy inasmuch as she had certain cracks between the gunwale and the coaming, and by an amendment made during the trial the plaintiffs also alleged that the *Jellicoe* was unseaworthy in that she was overloaded whilst alongside the steamer, in consequence of which she sank before proceeding upon her contemplated voyage to Nine Elms. Alternatively, the plaintiffs alleged that the *Jellicoe* sank owing to negligent overloading on the part of the servants of the stevedore.

The lightermen denied that the *Jellicoe* was unseaworthy; they denied liability and relied upon the London Lighterage Clause, subject to which the contract was entered into, and which purported to exempt them from liability for loss howsoever occasioned. The clause contained no provision exempting the lightermen from liability for unseaworthiness.

The stevedore denied that his servants were negligent in or about the stowage of the *Jellicoe*.

Roche J. gave judgment in favour of the stevedore, who in stowing the cargo acted in accordance with instructions from the lightermen's servants. He held, however, that the lightermen were liable. In his opinion, although the *Jellicoe*, notwithstanding the cracks which existed between the gunwale and the coaming, was seaworthy when the loading commenced, she was, when the loading was completed and while lying alongside the steamer waiting for the tug to tow her to Nine Elms, unseaworthy by reason of being overloaded. The lightermen's obligation under the contract was to provide a barge fit to undergo the ordinary vicissitudes arising in the course of the various stages of the employment, one of which stages was lying in the river waiting for the tug; and in his opinion there was a breach of that obligation when the barge, at the end of the loading stage, was so overloaded as to be a danger to herself and her cargo. With regard to the London Lighterage Clause, he held that it did not protect the lightermen as its terms did not obliterate the underlying obligation resting upon them to provide a seaworthy barge when the various stages of the employment were entered upon. He accordingly gave judgment for the plaintiffs against the lightermen.

The lightermen appealed.

Porter K.C. and *Wilfrid Lewis* for the appellants. Roche J.'s finding that the barge was seaworthy when sent to Erith to load the cargo is sufficient to exonerate the appellants. Their obligation was to send a seaworthy barge and they performed it. A shipowner gives no warranty against defects in the vessel which come into existence after the cargo is on board: *McFadden* v. *Blue Star Line* (1); nor against negligent overloading by stevedores. Here the barge was negligently loaded with a cargo of 190 tons. The warranty of seaworthiness does not impose upon a shipowner an obligation to have his ship during the loading in such a

(1) [1905] 1 K. B. 697.

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condition that no loss can be occasioned by negligence in the course of loading and stowing the goods: per Stirling L.J. in *Wade* v. *Cockerline*. (1) For damage so caused, he is liable if at all, as a carrier, but then he may, as the appellants have done, protect himself by special clauses in his contract. In *McFadden* v. *Blue Star Line* (2) Channell J. rejected the contention that the warranty of seaworthiness continues from the time the vessel is tendered for the reception of the cargo down to the time of sailing. Here there was only one stage. Taking cargo on board, and lying alongside the vessel which has discharged it, constitute one stage for a barge. Roche J. was therefore wrong in holding that one stage ended when the cargo was loaded and that another began when the barge was lying alongside with the cargo on board. The doctrine of stages has no application to a barge where no change in her equipment is necessary in the carrying out of the contract, but even if it can be said that the doctrine applies in the case of a barge, this barge was fit at the commencement of the loading, and the second stage, namely, sailing, had not commenced before the loss occurred. In *Wade* v. *Cockerline* (3) Vaughan Williams L.J. threw out the suggestion that there might be a warranty not only as to the fitness of the ship to receive the cargo, but also as to her fitness to hold and keep it safely till she sails; but, as he said, it was unnecessary to decide the point. In no case has that suggestion been acted upon. For the loss that occurred the London Lighterage Clause protects the appellants.

[They also cited *Kish* v. *Taylor* (4) and *Dixon* v. *Sadler*. (5)]

Miller K.C. and *H. Atkins* for the respondents. The London Lighterage Clause makes no reference to seaworthiness, and it must therefore be read as subject to the underlying obligation on the part of the lightermen to provide a seaworthy barge: see *Steel* v. *State Line* (6); *Atlantic Shipping and Trading Co.* v. *Dreyfus & Co.* (7) The clause

(1) 10 Com. Cas. 115, 122.
(2) [1905] 1 K. B. 697.
(3) 10 Com. Cas. 115, 120.
(4) [1912] A. C. 604.
(5) (1839) 5 M. & W. 405, 414.
(6) (1877) 3 App. Cas. 72, 87, 88.
(7) [1922] 2 A. C. 250, 260.

in itself affords no protection if the loss is due to the unseaworthiness of the vessel. Here the barge was unseaworthy when the loss occurred. Regard must be had to the service contemplated, which was the loading, lying in the river, and carriage of the goods from Erith to Nine Elms. Reliance is placed by the appellants upon the language of Channell J. in *McFadden* v. *Blue Star Line* (1), but when carefully examined it does not support their view. Channell J. did not say that if when the loading was completed the ship was not fit to encounter the risks of the next stage the shipowner would not be liable. Vaughan Williams L.J.'s observations in *Wade* v. *Cockerline* (2) support our contention; see also the judgment of Willes J. in *Bouillon* v. *Lupton*. (3) In this case the loading was completed, the second stage had begun, and she was then unfit to lie safely in the river, still less to be towed.

[They were stopped.]

Wilfrid Lewis replied.

Lord Hewart C.J. This is an appeal from a judgment of Roche J. in a claim by cargo owners against two sets of defendants, for damages for the loss of cargo. The learned judge found in favour of the stevedore, but against the lightermen, who now appeal.

The material facts may be briefly stated. The plaintiffs employed the lightermen to lighter 500 tons of wood pulp from the steamship *Borgholm*, when it arrived at Erith Buoys, to Nine Elms, upon a journey to Farncombe. For that purpose the appellants sent three barges, named respectively the *Jellicoe*, the *May* and the *Jessie*, which between them had a carrying capacity of 500 tons and more. The persons actually engaged in discharging the cargo from the ship were in the employment of the defendant stevedore. Those responsible for the stowing of the cargo were the persons in the lighters, but they in their turn employed the stevedore to carry out the stowage on their behalf.

The first lighter to be filled was the *Jellicoe*, which had a

(1) [1905] 1 K. B. 697. (2) 10 Com. Cas. 115, 120.
(3) (1863) 33 L. J. (C. P.) 37, 42.

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capacity to carry 170 tons and no more. The loading of that barge was in progress on December 17, 1925. In the result, more than 170 tons were put upon the *Jellicoe ;* in fact some 190 tons were loaded, and that quantity was, as the learned judge finds, and as I think is common ground, excessive. What followed was that some time before midnight the *Jellicoe* filled and sank, and her cargo of 190 tons of wood pulp was lost. It was in respect of that loss that the plaintiffs sought to recover damages.

It was made clear by the evidence, nor is it disputed, that the *Jellicoe* at all material times exhibited certain cracks, and as the process of loading went on and became completed, those cracks became, through perhaps more causes than one, both larger and more dangerous. The learned judge in the course of his judgment says this : " Certain cracks which I find were there were exposed, as they ought not to have been, to the presence and action of river water let in " ; then he adds : " I am not prepared to find that of themselves the presence of those cracks on the upper part of the deck of this lighter constituted unseaworthiness. The test applied, and I think rightly applied, by Channell J. in *McFadden* v. *Blue Star Line* (1), if and when put to myself here must be answered in a sense favourable to the lighter : ' If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it ? If he would, the ship was not seaworthy within the meaning of the undertaking.' Applying that to this case, in my view a prudent lighterman would not have refrained from sending his lighter to do this job had he known and realized that the cracks on the deck were open to the limited extent to which I find they were open. The truth is that those parts became of that importance, owing to the overloading of the *Jellicoe*, which they had never assumed before. It was the overloading which was the real cause of the loss of the *Jellicoe*, and it was the overloading which made the cracks significant as they would not otherwise have been."

(1) [1905] 1 K. B. 697.

In those circumstances, the conclusion at which the learned judge arrived was as follows: "I think, inasmuch as wrong loading, excessive loading, can amount to unseaworthiness, and constitute unseaworthiness, if the vessel is at the end of the loading stage so overloaded as to be a danger to herself and her cargo, that then there is a breach of the warranty which I find exists, that she shall be fit to complete or enter upon and carry out the next stage of the contract." And again, in another passage, the learned judge says: "I hold, as was held in the case of *The Galileo* (1) to which I have already referred, that as there the imposition of all risks upon the goods owner so here the imposition upon them of responsibility, or rather the bearing of all loss or damage to the goods, is not sufficient or effective to obliterate the responsibility on the part of the lightermen for the underlying or overriding obligation on them to provide a vessel or lighter, when the various stages of the contract of employment are entered upon, which shall be fit and seaworthy for the purpose of the work the subject-matter of the contract."

The question is whether, in so holding upon those materials, the learned judge came to a right conclusion in law. In my opinion he did. The doctrine of stages is of course familiar, and was explained in a sentence or two in the well known case, now more than sixty years old, of *Bouillon* v. *Lupton*. (2) There Willes J. said (3): "Let us see therefore what the assured undertake by the policy. In the first place they undertake that the vessel shall be seaworthy. Now, that means different things on different parts of the voyage; a vessel that was seaworthy for the voyage down the Rhone, would not be seaworthy when she left Marseilles. And, indeed, there is an intervening part of the voyage which gives rise to a third set of considerations, namely, that between Arles and Marseilles; you are here not in the river, but you are still not on the open sea. The question, therefore, arises—inasmuch as change was necessary, where was the proper place to make it? That is a question of evidence."

(1) [1914] P. 9. (2) 33 L. J. (C. P.) 37.
(3) 33 L. J. (C. P.) 42.

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It is urged in the present case on behalf of the respondents that in the true sense of the term, that is at the commencement of a stage, this barge was, and was rightly found to be, unseaworthy. As was said by Lord Sumner in *Atlantic Shipping and Trading Co.* v. *Dreyfus & Co.* (1): "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

Here there has been much argument upon the question whether it is true to say that there is an intervening stage between the stage of loading on the one hand and the stage of setting sail with the cargo on the other hand. A contrast, or a suggested contrast, has been pointed between the language of Channell J. in *McFadden* v. *Blue Star Line* (2) and that used in two passages in the judgment of Vaughan Williams L.J. in *Wade* v. *Cockerline*. (3) It does not seem to me to be necessary to pursue that controversy upon the facts of this case. Here the contract was to collect and to carry, and, after the evidence had been given, it was open to the learned judge to come to the conclusion that the stage of loading had been completed, and a moment had been reached when the next stage was commenced. Whether that next stage is truly to be described as the stage of lying in the river, or whether it is more accurately to be described as the stage of being towed, seems to me for the present purpose to be comparatively immaterial. The next stage had begun the moment the loading stage had been completed; and the learned judge, if I follow his judgment, finds that at the beginning of that stage—not in the midst of some stage but at the beginning of that stage—this barge was unseaworthy. In my opinion he was entitled so to find, and there

(1) [1922] 2 A. C. 250, 260. (2) [1905] 1 K. B. 697.
(3) 10 Com. Cas. 115, 120, 121.

is no error in law in the conclusion which, upon these facts, he has expressed. I think, therefore, that the appeal ought to be dismissed with costs.

Bankes L.J. I agree with the conclusion at which my Lord has arrived.

There appears to be no dispute about the facts in this case. The plaintiffs' complaint was that their goods had been lost owing to a breach of warranty on the part of the defendants, the lightermen. The facts were that a contract had been entered into between the parties under which the lightermen agreed to supply barges to proceed to Erith, take delivery there of the plaintiffs' cargo from the *Borgholm*, and, having taken delivery of it, take it by barge to Nine Elms. What happened was that one of the barges, the *Jellicoe*, was sent, was overloaded, and, because she was overloaded, sank whilst lying alongside the vessel, and before the tug came to take her away.

In the action as originally formulated, the plaintiffs' complaint was that there had been a breach of the warranty of seaworthiness in that this barge was defective; in their particulars they gave particulars of the defects, and they alleged that the vessel sank because of those defects. At the trial, the learned judge, having heard the evidence, found that the barge was not unseaworthy in that sense or for that reason, but he found that she was rendered unseaworthy because she was overloaded to a substantial extent; and in those circumstances, and at a late stage, he allowed an amendment to the effect that the unseaworthiness complained of was not defects in the barge, but was due to the fact that she was overloaded; and he then proceeded upon the facts to hold that the vessel was unseaworthy because of the overloading.

Upon that, the questions of law arose. The lightermen contended that the warranty of seaworthiness attached to the barge only at the commencement of the voyage, and that it was not a continuing warranty. That was not disputed as a matter of law. The lightermen then alleged that the

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voyage of this barge commenced—as I understand the argument—when she was sent to Erith in order to take delivery of the cargo under this contract, and the learned judge has found that she was seaworthy at that time, and in those circumstances the lightermen say that the plaintiffs have failed to prove any breach of that warranty. It was contended on the other side that this is a case in which there were stages in this voyage, and that she was not seaworthy at the commencement of one of these stages. The answer to that was this: Even assuming there were stages, and assuming that one of the stages was the loading stage, she was seaworthy at the commencement of the loading stage; unfortunately she sank before that stage was completed, or at any rate before the next stage began; and in those circumstances there is a failure to prove any breach of this warranty of seaworthiness.

I think it assists one very much in the determination of this question of law to look at the contract as a whole and to realize that in this particular contract, even if there are not stages, there are a number of different operations to be performed; and in my opinion it really is misleading, for the purpose of determining when the warranty of seaworthiness attached to this barge, to talk about the voyage commencing when the barge was despatched to Erith to load. I agree entirely with what Vaughan Williams L.J. said in *Wade* v. *Cockerline* (1) that it is a much more correct way to look at the matter to ask oneself what were the stages in what he calls "the transaction," or what I would prefer to call the contract undertaken; and when one considers this contract undertaken, which was to send the barge from wherever she was lying to Erith, to place her in a position in which she could load, to look after her while she was being loaded, to do whatever was necessary while she was lying there before the tug came to pick her up, to tow her to Nine Elms, and when she arrived there to moor her in position to unload her—when one considers that all those operations were covered by this contract, it assists one in taking a clear view of the liability of a person who enters into such a contract,

(1) 10 Com. Cas. 115, 120.

to speak of the stages of the contract undertaken, rather than of the stages of a voyage. From that point of view I think that Channell J.'s judgment and that of Vaughan Williams L.J. are in no conflict, because they both point out that there are stages in such a contract undertaken, and that in many of those stages it seems more appropriate to talk about the fitness than the seaworthiness of the vessel; and that, in considering whether or not a vessel is fit to load, one has to take different matters into consideration from those to be considered in determining whether she is fit to proceed to sea. As Channell J. pointed out, there may be many things that would have to be done to a vessel that was fit to load, before she would be fit to proceed to sea. No difficulty of that kind arises here, because it is quite plain that in this contract undertaken, there was a stage in which it was necessary that the vessel should be fit for loading, and if she was fit for loading when the loading commenced, and she sank before the loading was completed, I agree with what Vaughan Williams L.J. pointed out in *Wade* v. *Cockerline* (1) that it becomes immaterial to consider whether she would or would not be fit when the next stage commenced. But there is no doubt about the matter here. Roche J. has found in terms upon the clearest evidence, that the loading was completed before the barge sank. If it was in fact completed, there cannot be any intermediate stage. The next stage was the stage of lying ready to commence her voyage in the ordinary sense, as the learned judge seems to treat it, or, as it seems to me more accurate to say, the stage when she must be seaworthy in the sense of being ready to be towed to Nine Elms. Whether you treat it as a stage of lying in the river ready to be picked up by a tug, or whether you consider that the stage of actually commencing the voyage in the ordinary sense had commenced, is immaterial, because when once you find that the stage of loading was completed and that the vessel sank in the next stage of this contract undertaken, whatever it was, you must come to the conclusion that the learned judge was right in giving judgment for the plaintiffs.

(1) 10 Com. Cas. 115, 120.

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SCRUTTON L.J. I agree that the appeal should be dismissed, and substantially I am in agreement with the very careful judgment of Roche J. I only add some words of my own as to the law, in deference to the careful and elaborate argument that has been addressed to us by counsel for the appellants.

There is some confusion in the authorities as to the warranty of seaworthiness, due, I think, to two causes: first, the word "seaworthiness" is used in two senses: (1.) fitness of the ship to enter on the contemplated adventure of navigation, and (2.) fitness of the ship to receive the contemplated cargo, as a carrying receptacle. A ship may be unfit to carry the contemplated cargo, because, for instance, she has not sufficient means of ventilation, and yet be quite fit to make the contemplated voyage, as a ship. Secondly, the fact that there are these two meanings of seaworthiness, and that there may be different stages of seaworthiness according to different stages of the adventure, has led to some confusion in statements.

As was said in *Cohn* v. *Davidson* (1): "Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires." A ship, when she sails on her voyage, must be seaworthy for that voyage, that is, fit to encounter the ordinary perils which a ship would encounter on such a voyage. But she need not be fit for the voyage before it commences, and when she is loading in port. It is enough if, before she sails, she has completed her equipment and repair. But she must be fit as a ship for the ordinary perils of lying afloat in harbour, waiting to sail. She must, in my view, be fit as a ship, as distinguished from a carrying warehouse, at each stage of her contract adventure, which may, as in *Cohn* v. *Davidson* (2), commence before loading. And she may as a ship after loading be unfit to navigate because of her stowage, which renders her unsafe as a ship. *Kopitoff* v. *Wilson* (3) is a good example of this. There

(1) (1877) 2 Q. B. D. 455, 461. (2) 2 Q. B. D. 455.
(3) (1876) 1 Q. B. D. 377.

armour plates were so stowed that there was danger of their going through the ship's side, and they did. As Lord Sumner said in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (1): "Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo." *Wade* v. *Cockerline* (2) illustrates the latter part of the quotation. The ship was quite fit as a ship to carry the cargo she had on board if properly stowed; the bad stowage did not make the ship unfit as a ship, but did endanger the cargo.

Looked at from the point of view of a ship to sail the sea, the highest measure of liability will be when she starts on her sea voyage, and this is often spoken of as the stage when the warranty attaches; but what is meant is that it is the time when that highest measure of liability attaches. There are previous stages of seaworthiness as a ship, applicable to proceeding to loading port, loading, and waiting to sail when loading is completed.

On the other hand, the highest measure of liability as a cargo-carrying adventure, that is, of "cargoworthiness," is when cargo is commenced to be loaded. It has been decided that if at this stage the ship is fit to receive her contract cargo, it is immaterial that when she sails on her voyage, though fit as a ship to sail, she is unfit by reason of stowage to carry her cargo safely. Thus, in *The Thorsa* (3), where the ship sailed with chocolate and cheese stowed together, so that the chocolate was damaged, the Court of Appeal declined to hold the ship unseaworthy. That case was approved in *Elder Dempster's* case (4) in the House of Lords, where stowage of oil in casks, so that it was damaged by the weight of cargo on top, the stowage not affecting the sailing of the ship, was held not to be unseaworthiness for sailing. This limitation of the warranty of cargoworthiness

(1) [1924] A. C. 522, 561.
(2) 10 Com. Cas. 115.
(3) [1916] P. 257.
(4) [1924] A. C. 522.

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is expressly made, because negligent stowage of a seaworthy ship is something happening after the warranty of cargo-worthiness has been complied with, and, so long as the negligent stowage does not make the ship unseaworthy as a ship, does not affect a warranty which has already been complied with.

It was argued that the doctrine of stages was only a question of difference of equipment, and that overloading was not equipment. But damages unrepaired at the commencement of a new stage, collision during loading, and starting on the voyage with that damage unrepaired, may obviously be unseaworthiness at the commencement of the voyage stage. I see no reason for defining stages only by difference of equipment.

Applying the above statement of the law to the facts of the present case: the barge was sent to the ship's side to carry 170 tons, and she was fit to carry that quantity. The warranty of cargoworthiness was complied with when loading commenced. But then 190 tons were put into her, some 14 per cent. more than her proper load. With that cargo in, she had a dangerously low freeboard in calm water. I think at any rate one of her gunwales was awash, and water could continuously enter through cracks, which would be only an occasional source of leakage if she were properly loaded. She had to lie so loaded for some unascertained time in the river till a tug came. The ship was not bound to let the barge lie moored to the ship's side. She might have to navigate under oars to a barge road. She was exposed to all the wash of passing vessels, and the more water she took on board, the more dangerous she would become. It is clear that she was quite unfit to lie in the river for any time exposed to the wash of passing vessels and the natural "send" of the water. It is still clearer that she was quite unfit to be towed, and that she was in such a condition that she would soon go to the bottom. I am clearly of opinion that the barge was unseaworthy as a barge from the time loading finished, unfit to lie in the river, and still more unfit to be towed. I observe with surprise the

suggestion that the surplus of 115 bales might have been put back on the ship. What possible obligation the ship, which had delivered to a barge cargo which the bargeman said she could take, and had got a receipt for it, was under to hoist back by ship's steam and labour 115 bales, or 20 tons, and leave them about on the ship's deck, I cannot understand.

I accept the view of Channell J. in *McFadden* v. *Blue Star Line* (1) that the warranty of cargoworthiness, if complied with at the commencement of a stage, is not continuous during the stage, but this view does not negative the position that at the commencement of a new stage of the adventure there is a renewed warranty of seaworthiness as a ship. It seems to me clear that there would be a renewed warranty when the towage started, and that this overloading would be a breach of the warranty. If the leaks found by Channell J. in the *Blue Star Line* case (1) had admitted so much water that the safety of the ship was endangered, and if the leaks were incapable of being remedied on the voyage, there would clearly have been a breach of the warranty of seaworthiness as a ship, on sailing on the voyage. It seems equally clear that if an overloaded barge, seaworthy in the calm waters of a dock, went out into the river to wait for a tug, there would be a renewed warranty of fitness to navigate and wait, which would be broken by overloading rendering the barge unfit to lie waiting in the river. And I think in the present case, when the loading was finished and the man in charge, apparently in the ordinary course of his business, left her unattended in the river waiting for a tug, and unfit in fact either to lie in the river or be towed, there was a new stage of the adventure, a new warranty of fitness for that stage, and a breach of that warranty which prevented the exceptions from applying.

Appeal dismissed.

Solicitors for appellants: *J. A. & H. E. Farnfield.*
Solicitors for respondents: *Constant & Constant.*

(1) [1905] 1 K. B. 697.

J. S. H.

Applied. FOSTER *v.* ROBINSON. [1950] 2 All E.R. 342.

Applied. FOSTER *v.* ROBINSON [1951] 1 K. B. 149

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Dec. 2, 20.

METCALFE *v.* BOYCE.

Landlord and Tenant—Lease—Surrender by operation of Law—Former Tenant continuing in Occupation—Estoppel—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 3.

In 1910, the defendant, who was a county police constable, became quarterly tenant of a house. In 1912 the county police authority, which had till then made a grant in aid of the rent of houses occupied by police constables, decided that for the future the Chief Constable should be the tenant of those houses, that the constables should occupy them as servants, that the Chief Constable should pay all rent, rates and taxes, and that a deduction should be made in respect thereof from the men's pay. The defendant knew of, and made no demur to, this arrangement, but no express notice to determine his tenancy was given. From 1912 onwards the demands for rent were sent to the defendant, addressed to the county authority. These the defendant took to the police office, received the full amount due, and paid it at the estate office of the landlord, being given a receipt acknowledging payment by the county authority, which receipt he sent to the county treasurer. No demands for rates and taxes were made to the defendant. This course of business continued for fourteen years, the defendant continuing to occupy the house and his name remaining on the estate books as tenant. There was no written surrender or assignment of the tenancy :—

Held, that there was evidence from which the inferences of fact could be drawn that in 1912 the defendant agreed with the landlord that he would forthwith surrender his tenancy, that the landlord agreed with the defendant to accept the surrender and accept the Chief Constable as his tenant, and that the defendant would in future occupy the house as a servant of the Chief Constable and not as a tenant, and that on those facts there had been a surrender of the tenancy by operation of law, and further, that the defendant was in the circumstances estopped from denying that he had surrendered or assigned the tenancy.

Peter v. *Kendal* (1827) 6 B. & C. 703 applied.

APPEAL from Yatton County Court.

The following statement of facts is taken from the judgment of Salter J. :—

"In this case the plaintiff sued in the Somerset County Court to recover possession of a house, being No. 2 Orchard Cottages at Blagdon in that county. Judgment was given for the plaintiff and the defendant appeals. The house in question is the property of Sir George Wills and was tenanted in 1910 by one Skinner, who was the policeman then stationed at Blagdon. In that year Skinner was moved and the defendant appointed in his place. The defendant became

tenant of this house from Sir George Wills on a quarterly tenancy at a yearly rent of 12*l.* payable quarterly, the tenant paying rates and taxes. It is common ground that this tenancy continued until 1912. In those days the members of the county police force who were not quartered in barracks received a grant in aid of their rent. From 1910 to 1912 the demands for the quarterly rent were addressed to the defendant, he went to the police office and drew the grant to which he was entitled and then paid the rent, taking a receipt in his own name. Demands for rates and taxes were addressed to him and paid by him. He drew his pay in full.

In 1912 the county police authority adopted a new system. It was decided that, in future, the Chief Constable should be the tenant of all houses occupied by policemen not in barracks, that the policemen should occupy them as servants and not as tenants, that the chief constable should pay all rent, rates and taxes, and that a deduction should be made from the men's pay. This change was announced in a general order dated April 22, 1912, and it is admitted that the defendant had notice of its terms.

No express notice to determine the defendant's tenancy was given by the defendant or the landlord. From 1912 onwards the quarterly demands for rent were sent to the defendant addressed to the county authority, the defendant took them to the police office and received the full amount of the rent due, he paid this at the estate office and received a receipt acknowledging payment by the county authority and sent the receipt to the county treasurer. No demands for rates and taxes were addressed to him and he paid none. This course of business continued for fourteen years. He continued to occupy the house and his name remained on the estate books as tenant. Deductions, varying in amount from time to time, were made from his pay on account of rent. During two periods in the fourteen years quarters were free, and at those times no deduction was made from his pay. In 1923 a form of tenancy agreement was sent from the estate office to the defendant and to other occupiers

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of houses on the estate. They all refused to sign it. At the hearing, the landlord's representative said that the documents had been sent in error.

In November, 1925, the defendant gave notice of his intention to retire on pension. In January, 1926, a tenancy agreement in writing was signed by the landlord and the plaintiff creating a quarterly tenancy at a yearly rent of 12*l.* payable quarterly, the tenant paying rates and taxes. On March 26, 1926, the defendant retired on pension. He refused, on demand, to give up the house, and the plaintiff, who is and was at all material times the Chief Constable of Somerset, brought this action for possession. It was necessary for him to show that the defendant's tenancy which existed in 1912 had been surrendered or assigned. In the absence of writing it was necessary to show a surrender or assignment by operation of law. The plaintiff's case was that the tenancy had been surrendered or assigned by operation of law in 1912.

The learned judge held, on the evidence, that there had been a valid surrender, or alternatively, a valid assignment, by operation of law in 1912. The question is whether he was right in law."

Croom-Johnson and *F. Cyril Williams* for the defendant. The county court judge was wrong in holding that there was a valid surrender or a valid assignment in 1912 of the tenancy of the house. Sect. 3 of the Statute of Frauds requires assignments and surrenders to be by deed or note in writing, "or by act and operation of law." Admittedly there was no written surrender, and it is submitted that there was no surrender by act and operation of law. There can be no surrender by operation of law if the same person continues in possession, as was the case here: see *Taylor* v. *Chapman* (1); *Mollett* v. *Brayne* (2); *Johnstone* v. *Hudlestone* (3); *Wallis* v. *Hands* (4), where Chitty J. stated the proposition of law

(1) (1795) Peake's Add. Cas. 19 and note p. 20.
(2) (1809) 2 Camp. 103.
(3) (1825) 4 B. & C. 922.
(4) [1893] 2 Ch. 75, 82.

thus: "There is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents. . . . . To hold that mere oral assent to the new lease operates as a surrender in law would be a most dangerous doctrine; it would practically amount to a repeal of the Statute of Frauds. . . . . The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act in pais, the law attributing the force of estoppel to certain acts of notoriety, such as livery of seisin, entry, acceptance of an estate, and the like; and the grant of a new lease to a stranger, with the tenant's assent, and change of possession preceding or following the lease, bring such a case within the scope of the same doctrine, which mere oral assent would not do." Here there was no assent in fact by the defendant to a new tenancy in favour of the plaintiff.

Schiller K.C. and *Wethered* for the plaintiff. It is not essential to a valid surrender by operation of law that there should be a physical change of occupation; it is sufficient if there is a change in the nature of the occupation: *Peter* v. *Kendal.* (1) There the owner of a ferry demised it to A. by parol at a certain annual rent. A., at the end of a few weeks, finding it unprofitable, proposed to become the servant of the owner as boatman and to account to him for all money received from passengers, upon being allowed fixed daily wages. This was assented to by the owner of the ferry, and A. became his servant and received the stipulated wages. Those being the facts, Bayley J. in his judgment said (2): "A new relation which, in regard to this property, was wholly inconsistent with that of landlord and tenant, then took place, with the consent of both parties. That operated as a surrender, by operation of law, of the tenant's interest in the ferry." So here, from what took place in 1912, the county court judge could properly draw the inference that a new relation was created and that the defendant who, theretofore, was the tenant, became a service

(1) 6 B. & C. 703. (2) 6 B. & C. 710.

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occupier and that the landlord released his rights against the defendant. After that date the landlord could not demand rent from the defendant in view of the bargain with the county authority. The principle of *Walsh* v. *Lonsdale* (1) is applicable.

Further, the defendant by assenting to the arrangement arrived at in 1912 is estopped from denying that he has surrendered or assigned his tenancy.

Croom-Johnson in reply. *Peter* v. *Kendal* (2) is clearly distinguishable from the present case. There an incorporeal right being in question the element of notoriety referred to by Chitty J. in *Wallis* v. *Hands* (3) was necessarily absent, whereas in this case there is the defendant's actual occupation of the house. Moreover, if there was to be a surrender it must have been to the landlord, and there was in fact no surrender to him. With regard to *Walsh* v. *Lonsdale* (1), it is submitted that the principle there laid down cannot be invoked as against the plain provisions of s. 3 of the Statute of Frauds.

[SALTER J. Is the defendant not estopped from denying that there was a surrender ?]

No evidence was directed to this point, which cannot therefore be raised now.

Cur. adv. vult.

Dec. 20. SALTER J. stated the facts already set out and continued : I think that in view of the evidence and of the note of his decision it must be taken that the county court judge drew the following inferences of fact—namely, that in 1912 an arrangement was made between the defendant, his landlord, and the plaintiff, who was his employer. The defendant agreed with the landlord that he would forthwith surrender his tenancy, and the landlord agreed with the defendant to accept the surrender and to accept the plaintiff as his tenant. The defendant agreed with the

(1) (1882) 21 Ch. D. 9. (2) 6 B. & C. 703.
(3) [1893] 2 Ch. 75, 82.

plaintiff that he would surrender the tenancy to the landlord, and would in future occupy the house as a servant and not as a tenant; the plaintiff agreed with the defendant to accept a tenancy from the landlord, to allow the defendant to occupy as a servant and to pay the rent, rates and taxes. The plaintiff and the landlord agreed that the plaintiff should become tenant in place of the defendant and on the same terms.

I think there was evidence on which the learned judge could properly draw these inferences of fact. He further negatived the suggestion that the defendant made the above agreements under duress. The Rent Restriction Acts did not then exist, and the change was beneficial to the defendant on the whole. As regards rent he did not lose and sometimes gained, and he was relieved from payment of rates and taxes.

The grant of a new tenancy by the landlord to the plaintiff, with the assent of the defendant, operated as a surrender of the defendant's tenancy, if the defendant gave up possession to the plaintiff at or about the time of the grant of the new tenancy. In my opinion the defendant, while remaining in occupation of the house, did give up possession of it to the plaintiff in April, 1912, and the plaintiff took possession and remained in possession by his servant.

In *Peter* v. *Kendal* (1) it was necessary for the plaintiff to prove that a parol demise of a ferry by him to one Brown had been determined by surrender by operation of law. He proved that Brown, finding the ferry unprofitable, had agreed with him by parol to determine the tenancy and to work the ferry as the plaintiff's servant, and that Brown had then received wages and accounted for the takings. It was held that this effected a surrender of the tenancy by operation of law. A master is in possession of land rented by him and occupied by his servant, as such, and not as a tenant.

I think the defendant, in pursuance of his agreement, ceased to occupy as tenant and occupied for his master, the

(1) 6 B. & C. 703.

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plaintiff. There was therefore a good surrender by operation of law and the appeal fails.

MACKINNON J. I agree. The plaintiff says that by reason of what happened in 1912 there was either a surrender by the defendant of his interest to Sir George Wills, or an assignment by the defendant of his interest to the plaintiff. The learned county court judge seems to have accepted this contention. The only possible ground on which his judgment can be impugned is by the defendant's reliance on s. 3 of the Statute of Frauds. And as there was clearly no written surrender, or assignment, the sole question is whether the plaintiff can say that there was a surrender or assignment by act or operation of law. We are told that this question was argued in the court below, though there is no specific mention of it in the judgment.

I think the cases cited to us, especially the judgment of Chitty J. in *Wallis* v. *Hands* (1) show that the act or operation of law can be relied on when the party who is defending himself with s. 3 is estopped from denying that he has surrendered, or assigned, his interest. One form of such estoppel arises when a substituted tenant actually takes possession. Salter J. has pointed out that that principle applies here. I agree that in the circumstances of this case the estoppel of the defendant can be asserted by the plaintiff. For on the facts the plaintiff can say to the defendant: "As a result of what happened in 1912 I have paid the rent every quarter, and I have also paid the rates. These are liabilities I have undertaken in consequence of your assent to my proposal at that time. I have altered my position for the worse, and you, especially in regard to the rates, have taken advantage of my action. You are therefore estopped from now denying the surrender or assignment." That contention seems to me to have all the necessary ingredients of a plea of estoppel, and, if so, the plaintiff can rely upon a surrender or assignment by act or operation of law sufficient to satisfy s. 3 of the Statute of Frauds.

(1) [1893] 2 Ch. 75.

I therefore agree that this appeal should be dismissed with costs.

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Appeal dismissed.

Solicitors for plaintiff: *Cameron, Kemm & Co., for John Hodge & Co., Weston-super-Mare.*

Solicitors for defendant: *Calder Woods & Sandiford, for George Stredwick, Bristol.*

J. S. H.

THE KING *v.* MINISTER OF HEALTH.

Ex parte DORE.

1927

Jan. 13; *Feb.* 7, 14.

Local Government—Borough Council—Accounts—Surcharge by District Auditor—Certiorari to quash—Rule discharged—Remission of Surcharge by Minister of Health—Jurisdiction—Poor Law Amendment Act, 1844 (7 & 8 *Vict. c.* 101), *ss.* 35, 36—*Poor Law Audit Act,* 1848 (11 & 12 *Vict. c.* 91), *s.* 4.

Where borough councillors surcharged by a district auditor have appealed, under s. 35 of the Poor Law Amendment Act, 1844, against the surcharge by a writ of certiorari to remove the certificate of surcharge into the King's Bench Division to be quashed, the alternative appeal to the Minister of Health given by s. 36 of the Act is lost, and the Minister has no power under s. 4 of the Poor Law Audit Act, 1848, after the rule has been discharged, to remit the surcharge.

Dictum of Wills J. in *Reg.* v. *Cockerton* [1901] 1 Q. B. 322, 350 disapproved.

RULE NISI for certiorari.

The applicant, John Buchanan Dore, a ratepayer in the borough of Poplar, obtained on July 29, 1926, a rule nisi for a writ of certiorari calling upon the Minister of Health to show cause why a certificate of remission of surcharges given by him should not be removed into the King's Bench Division to be quashed. The facts, which are fully set out in the judgment, were, shortly summarized, as follows:—

The district auditor in June, 1923, surcharged certain councillors of the Poplar Borough Council. These surcharges were finally affirmed by the House of Lords in April,

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1925: see *Roberts* v. *Hopwood*. (1) On April 9, 1925, the borough council, purporting to act on behalf of the surcharged councillors, made an application, under s. 4 of the Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), to the Ministry of Health, to remit these surcharges, and the Minister eventually did so.

The applicant then obtained this rule.

At the hearing on January 13, 1927, the case was adjourned, in the absence of evidence that the council was acting as the agent of the surcharged councillors, in order that the latter might have the opportunity of being heard. At the resumed hearing on February 7, 1927, it appeared that between thirty and forty of the above councillors had been served with notice of the rule, but none of them now appeared or were represented.

Sir D. Hogg A.-G. and *W. Bowstead* showed cause. By s. 35 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), any person aggrieved by a surcharge may apply to the King's Bench for a writ of certiorari to remove the order of surcharge into the Court for the purpose of quashing it. By s. 36 such person "in lieu of making" such application may appeal to the Poor Law Commissioners (now the Minister of Health (2)), who may make such order as they deem requisite. And by s. 4 of the Poor Law Audit Act, 1848, the Minister of Health, if he finds that the surcharge was lawfully made, but that the subject-matter thereof was incurred under such circumstances as make it fair and equitable that the surcharge should be remitted, may remit it, and it was under that section that the Minister purported to act in the present case. At first sight it would appear that the appeal to the Minister is alternative to the remedy by certiorari, and that the right to remit only exists where the former alternative has been adopted; but in *Reg.* v. *Cockerton* Wills J. said (3): "I can see nothing whatever

(1) [1925] A. C. 578.

(2) See 21 & 22 Vict. c. 98, s. 60; 34 & 35 Vict. c. 70, s. 2, and Schedule, Part 1; and 9 & 10 Geo. 5, c. 21, s. 3, sub-s. 1 (*a*).

(3) [1901] 1 Q. B. 322, 350.

to prevent the appellants "—who had unsuccessfully applied for a writ of certiorari—" from applying to the Local Government Board "—the predecessors of the Minister of Health (1)—" under the provisions of 11 & 12 Vict. c. 91, s. 4, to remit the surcharges." That case went to the Court of Appeal (2), and no comment was made on that passage, and it has been acted on ever since. In *Attorney-General* v. *Merthyr Tydfil Union* (3) Lindley M.R. seemed to assume that the power to remit existed after the appeal by way of certiorari. It is desirable from the point of view of the Minister of Health that the practice should be settled by this Court, for it is obvious that if it is held that the decision of the King's Bench is final, persons surcharged will always resort to the Minister, who may remit though holding that the surcharge was lawful. No doubt the words " in lieu of " in s. 36 of the Act of 1844 do create a difficulty. It is probable that originally these were strictly alternative remedies without the power of remission, and the draftsman of the Act of 1848 which conferred the power to remit did not observe the language of s. 36. It is difficult to suppose that the legislature intended to distinguish between the consequences of the decision of the King's Bench and those following that of the commissioners, that the surcharge was lawful. The persons surcharged in the present case could not appeal to the Minister on the merits of the surcharges after the King's Bench Division had given its decision.

Croom-Johnson for the Poplar Borough Council, said he was only instructed in order to assist the Court.

Scholefield K.C. and *H. A. Hill* in support. The Minister had no jurisdiction to remit. In *Roberts* v. *Hopwood* Atkin L.J. said (4): " When once the appellate jurisdiction of the High Court has been invoked the appellate jurisdiction of the Ministry of Health vanishes." The dictum of Wills J. in *Reg.* v. *Cockerton* (5) to the contrary was obiter, and, moreover, the point had not been dealt with in the argument.

(1) 9 & 10 Geo. 5, c. 21, s. 3, sub-s. 1 (*a*).
(2) [1901] 1 Q. B. 726.
(3) [1900] 1 Ch. 516, 546.
(4) (1925) Appendix to the printed proceedings before the House of Lords, p. 62.
(5) [1901] 1 Q. B. 322, 350.

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Sect. 4 of the Act of 1848 contemplates that the merits of the application and the question of remission shall be dealt with at the same time.

Cur. adv. vult.

1927. Feb. 14. The judgment of the Court (LORD HEWART C.J., AVORY and SALTER JJ.) was read by

AVORY J. On July 29, 1926, this Court granted a rule nisi on the application of John Buchanan Dore, a ratepayer of the metropolitan borough of Poplar, calling upon the Minister of Health to show cause why a certain certificate of remission of surcharge of the sum of 5000*l.* made by the district auditor upon certain councillors of the said borough should not be removed into this Court with a view to its being quashed upon the grounds: (1.) that the persons surcharged having moved the King's Bench Division to quash the surcharge there was thereafter no right of appeal to the Minister of Health; (2.) that no appeal against the disallowance and surcharge was in fact made to the Minister of Health; (3.) that if there was a right of appeal to the Minister of Health and if an appeal was in fact made and/or if it was in his power to entertain and decide upon an application for a remission of the surcharge his decision upon the appeal and/or application for remission was ultra vires and in excess of the powers conferred upon him.

The material facts are that on June 6, 1923, the district auditor certified that in the accounts of the council of the said borough for the year ended March 31, 1922, he had disallowed to the extent of 5000*l.* charges in respect of wage payments made by the council and had surcharged the said 5000*l.* upon certain of the councillors named in his certificate. On June 26, 1923, this Court granted, on the application of the persons surcharged, a rule nisi for a writ of certiorari to remove into this Court the said certificate of disallowance and surcharge with a view to its being quashed. On November 21, 1923, this Court, after argument, discharged the rule nisi and affirmed the decision of the district auditor. (1)

(1) [1924] 1 K. B. 514, sub nom. *Rex* v. *Roberts; Ex parte Scurr.*

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On June 23, 1924, the Court of Appeal reversed this decision (1), but on appeal to the House of Lords, the order of the Court of Appeal was, on April 3, 1925, reversed, and the order of this Court restored. (2) On April 9, 1925, the borough council of Poplar, purporting to act on behalf of the surcharged councillors, made an application to the Minister of Health that the surcharge should be remitted, and after negotiation with the council, the Minister, on May 20, 1926, made an order remitting the surcharge of 5000*l*. The question to be determined is whether he had power in the circumstances to make this order of remission.

The Poor Law Amendment Act, 1844, s. 32, provides for the disallowance by the auditor of items in the accounts and for the surcharge of moneys, improperly or illegally expended, upon the persons authorizing the payment or otherwise answerable for such moneys, and by s. 35 any person aggrieved by such disallowance or surcharge is empowered to apply to the King's Bench Division for a writ of certiorari to remove the disallowance or surcharge into the said Court. By s. 36 of the same Act it is provided that any person aggrieved by such disallowance or surcharge may, in lieu of making application to the Court for a writ of certiorari, apply to the Poor Law Commissioners (now the Minister of Health (3)) to inquire into and decide upon the lawfulness of the disallowance or surcharge, and thereupon the commissioners may make such order therein as they deem requisite for determining the question. The Poor Law Audit Act, 1848, s. 4, provides that where an appeal is made to the said commissioners against any such disallowance or surcharge, and they find that it has been, or may be lawfully made, they may under certain conditions remit the same, and it is under the power conferred by this section, if any, that the Minister of Health purports to have made the order of remission in this case.

In the present case there was no appeal to the Minister of Health under s. 36 of the Act of 1844, or under s. 4 of the

(1) [1924] 2 K. B. 695. *Roberts* v. *Hopwood.*
(2) [1925] A. C. 578, sub nom. (3) See ante, p. 766, note (2).

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Act of 1848 against the disallowance or surcharge, the persons aggrieved having chosen the alternative remedy by certiorari under s. 35 of the Act of 1844, and as the jurisdiction to make an order of remission only arises upon such an appeal to the Minister of Health, the order in this case appears to have been made without jurisdiction and cannot be supported. This view is confirmed by reference to s. 247, sub-s. 8, of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which applies to urban authorities that are not the council of a borough, and provides the same alternative remedies in the case of a disallowance or surcharge and confers upon the Local Government Board (now the Minister of Health (1)) the power to remit, but only in the event of an appeal to the Local Government Board against the disallowance or surcharge.

Our attention was called to an observation made by Wills J. in *Reg.* v. *Cockerton* (2) to the effect that there was nothing in that case to prevent the appellants from applying to the Local Government Board under the provisions of 11 & 12 Vict. c. 91, s. 4, to remit the surcharge; but the point had not been argued, the difficulty that arises in the present case was clearly not present to the mind of the learned judge, and this obiter dictum cannot, we think, be accepted as authority to support the respondents' contention.

Having come to the conclusion that the rule should be made absolute on the ground that the Minister of Health had no jurisdiction to make the order of remission, it is unnecessary to consider whether, in the circumstances of this case, the order could properly be made.

Rule absolute.

Solicitor showing cause: *Solicitor to Ministry of Health.*
Solicitor to Poplar Borough Council: *W. H. Thompson.*
Solicitors in support: *Charles G. Bradshaw & Waterson.*

(1) 9 & 10 Geo. 5, c. 21, s. 3, sub-s. 1 (*a*). (2) [1901] 1 Q. B. 322, 350.

W. L. L. B.

MARTIN *v.* BENSON.

1926
Nov. 19.
1927
Jan. 28.

Costs—Action tried with Jury—Defamation—Nominal Damages—Order depriving Plaintiff of Costs—"Good cause"—R. S. C., Order LXV., *r.* 1.

Per McCardie J.: Where an action for defamation is tried by a judge with a jury, and the plaintiff recovers nominal damages only, the judge, in deciding whether there is "good cause" for making an order under Order LXV., r. 1, depriving the plaintiff of costs, should take into consideration all the circumstances of the case, both before and after the issue of the writ. The smallness of the damages is only one element for consideration. The judge must exercise a discretion independent of any view expressed by the jury on the question of costs.

ACTION for slander tried before McCardie J. and a special jury.

The plaintiff was the managing director of a company, Bamford & Martin, Ld., motor engineers, and the defendant was a director of the company. The action was brought by the plaintiff, who alleged that the defendant had on three separate occasions uttered words imputing dishonesty to him. The defendant denied that he had uttered the words complained of, and, in the alternative, pleaded that some of them were true. The jury found that the defendant had in fact published the words complained of and that the defendant's plea of justification had not been proved, and on each of seven separate heads dealt with by them, they awarded to the plaintiff damages of one farthing only or $1\frac{3}{4}d.$ in all. McCardie J. reserved the question of costs for argument. The facts are fully stated in the judgment of the learned judge.

Birkett K.C. and *J. W. Morris* for the plaintiff.
Sir Leslie Scott K.C. and *Hugh Beazley* for the defendant.

Cur. adv. vult.

1927. Jan. 28. McCARDIE J. read the following judgment: This action for slander was tried before me with the assistance of a special jury. The question on which I now give my decision relates to costs only. It will not be necessary to state the many details of the case. It will suffice if I mention

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the broad features only. The plaintiff was the managing director of a limited company and the defendant was a director of that company. The plaintiff sued the defendant for three separate slanders alleged to have been spoken on November 18, 1925, November 24, 1925, and November 27, 1925. In substance the defences were two—namely, first, non-publication, and, secondly, justification. There was no plea of privilege. The words complained of contained a number of serious allegations against the plaintiff, and the defendant did not seek to dispute their meaning at the trial. The particulars of justification were expressed in the clearest and most unambiguous terms. They charged the plaintiff (inter alia) with three felonies of larceny, with criminal conspiracies, and with several acts of dishonesty.

The trial of the action lasted for many days. Much of the evidence was of an intricate character. At the conclusion of the summing-up I left a series of questions to the jury which covered the various points raised by the defence and the particulars of justification. Those questions are on the record and I need not recite them seriatim; I need only summarize them. The jury found that the defendant had in fact published the words complained of, and they found also as to each separate matter of justification that the plea of justification had not been proved by the defendant. Upon each of the seven separate heads dealt with by them the jury awarded the plaintiff damages to the extent of one farthing only. The damages awarded were, therefore, $1\frac{3}{4}d.$ in all. With respect to two of the heads the jury by their written replies to the questions left to them awarded no damages at all, but upon my pointing out to them that technically the plaintiff would be entitled to some damage upon their finding of fact they thereupon unanimously assessed the damages at one farthing upon each of those heads. Thus, as I have said, the total damages amounted to $1\frac{3}{4}d.$ After the jury had given their verdict the defendant's counsel asked that the plaintiff should be deprived of costs. To this application I was (after hearing the plaintiff's counsel, Mr. Birkett K.C.) about to accede. Mr. Birkett then asked for an opportunity

of examining the decisions and of presenting a reasoned argument at a later date. I assented to this suggestion, and on a subsequent day I had the advantage of a full and able argument from Mr. Birkett K.C. for the plaintiff, and from Sir Leslie Scott K.C. for the defendant.

I must add a few further facts. The plaintiff's counsel pointed out to the jury in the plainest words the gravity of the accusations made against his client, and he asked for damages which would fully vindicate the plaintiff's character and conduct. The defendant's counsel stated in express language that he too recognized the serious character of the allegations made, and as to the criminal offences charged he said that he regarded himself as occupying the position of a prosecuting counsel with respect to the burden of proof. The jury were fully alive to the considerations involved. They had followed every part of the case, both as to the parol evidence and the documents, with the closest and most patient attention. As a result of the trial they awarded to the plaintiff, as I have said, the sum of $1\frac{3}{4}d.$ damages only. The amount given was as contemptuous as it could be.

The question for decision is whether or not I should make an order depriving the plaintiff of costs. The jurisdiction of the Court in such a matter rests to-day on Order LXV., r. 1, which provides (in substance) that where an action is tried with a jury the costs shall follow the event unless the Court, for good cause, shall otherwise order. The words "good cause" have been discussed in many cases, and it is not easy to elicit a clear meaning from so broad a phrase. The Court has a discretion, but it is a discretion which must of course be exercised judicially. The notes in the practice books upon Order LXV., r. 1, are replete with decisions upon the point. Before the Judicature Act of 1873 in actions of libel and slander damages under 40*s.* did not carry costs: see per Bowen L.J. in *Moore* v. *Gill.* (1) Hence the problem did not then arise which to-day calls from time to time for judicial consideration when trivial damages are given in claims for defamation. Order LXV., r. 1, it is to be noted

(1) (1888) 4 Times L. R. 738.

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applies to all actions tried with a jury. It contains no special provision with respect to actions of libel and slander. It is obvious, however, that each type of action may have its particular aspects and call for distinctive consideration. With respect to every class of jury action, however, it seems to be clear that the judge is to decide the question of costs independently of any view expressed by the jury. In the case now before me the jury expressed in clear and emphatic manner their own view that each party should pay his own costs. But, as Hawkins J. pointed out in *Roberts* v. *Jones* (1): "The judge is under no obligation to give effect to any special reasons or views the jury may have entertained or expressed in giving their verdict—such, for instance, as a hope or recommendation that it may or may not carry costs, unless such views accord with his own." See too the even clearer words of James L.J. in *Harnett* v. *Vise* (2) and per the Court of Appeal in *Wootton* v. *Sievier*. (3) It is plain that the judge must exercise his discretion as to costs, not only unfettered by, but wholly independently of, any view expressed by the jury on that particular matter.

Now what is "good cause" in such a case as the present? In *Forster* v. *Farquhar* (4) (which was not a case of defamation) Bowen L.J., in giving the judgment of the Court, said: "No nearer and no closer definition can be given than that there will be 'good cause' whenever it is fair and just as between the parties that it should be so." But the question still remains as to when it is fair and just to make a special order depriving the plaintiff of costs upon a trial by jury. The constantly cited decision of *Jones* v. *Curling* (5), which again was not a case of defamation but of ejectment, indicated in substance that upon the question of "good cause" within Order LXV., r. 1, "the facts must show the existence of something, having regard either to the conduct of the parties or to the facts of the case, which make it more just that an exceptional order should be made than that the case

(1) [1891] 2 Q. B. 194, 198.
(2) (1880) 5 Ex. D. 307, 311.
(3) (1913) 30 Times L. R. 165.
(4) [1893] 1 Q. B. 564, 567.
(5) (1884) 13 Q. B. D. 262, 268.

should be left to the ordinary course of taxation" : per Brett M.R. Taking then the broad statements of Bowen L.J. and Brett M.R. in the cases I have cited, the question here is as to the manner in which they should be applied to actions for defamation. Upon this point *Harnett* v. *Vise* (1) is important. It was an action for libel. The plaintiff had secured a verdict for 10*l.* damages, but had been deprived of costs by Huddleston B. under a rule of Court substantially similar to Order LXV., r. 1. The matter went to the Court of Appeal. They affirmed the decision of the judge (which had been approved by a Divisional Court) and they laid down a useful principle. That principle was stated by James L.J. as follows : "It is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case ; everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of." The Court, therefore, is not confined in any way to that which has occurred since the writ. It may look at all the relevant matters which took place before the writ. In this connection it is worth while to mention the wide area of considerations which is open to a jury with respect to the assessment of damages : see *Praed* v. *Graham*. (2) The jury, as Lord Esher there pointed out, may consider the plaintiff's conduct before action, after action, and in Court during the trial. As James L.J. indicated in *Harnett* v. *Vise* (1), when dealing with the question of costs there may be a great deal in the conduct of a plaintiff which shows that he himself has brought about the defamation complained of. This point I think is important. A like view of the principle was expressed by A. L. Smith L.J. in *Bostock* v. *Ramsey Urban Council* (3) (a case of malicious prosecution), where the successful defendants were deprived of costs. I may mention too the words of Atkin L.J. in *Ritter* v. *Godfrey* (4), where he expressed the view that "there would be grounds

(1) 5 Ex. D. 307, 311.
(2) (1889) 24 Q.B. D. 53.
(3) [1900] 2 Q. B. 616, 622.
(4) [1920] 2 K. B. 47, 61.

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for dealing with a successful plaintiff's costs when his conduct had induced the defendant reasonably to believe that he has a good defence." The principle seems clear: the difficulty lies in the application. It is in the light of the decisions cited, and particularly of *Harnett* v. *Vise* (1), that other rulings on the question of costs in actions for defamation should be considered. It must, I take it, be now deemed clear law that a plaintiff is not to be deprived of costs merely because a jury has given nominal damages. See *O'Connor* v. *Star Newspaper Co.* (2), where, however, as A. L. Smith L.J. pointed out, the smallness of the damages was "an important element to be considered if there are any other circumstances which can be taken into account." In that case the plaintiff, who recovered one shilling damages, was in fact deprived of costs.

It may not, of course, be right to deprive a plaintiff of costs where nominal damages only have been given upon the request of the plaintiff's counsel and where good ground exists for thinking that the assessment of a trivial sum by the jury was referable to that request. But if no particular circumstance such as that I have just suggested by way of example exists, and a jury award contemptuous damages, what ought a judge to do in the exercise of his discretion? There are several decisions and dicta which help to a conclusion. In *Moore* v. *Gill* (3) Bowen L.J. said: "It seems to me in this case that a farthing damages means that the action ought not to have been brought and that it is prima facie good cause for depriving the plaintiff of costs." In *Wood* v. *Cox* (4), where the plaintiff obtained one farthing damages only, Bowen L.J. said: "The jury by giving such damages said in effect that the plaintiff did not deserve to get more than a farthing, though the libel was a serious one." In the course of the argument he had said: "In law a plaintiff brings an action, not to clear his character, but to recover damages. If the jury only give him a farthing, might it not be said that he ought not to have brought the

(1) 5 Ex. D. 307.
(2) (1893) 68 L. T. 146, 148.
(3) 4 Times L. R. 739.
(4) (1888) 5 Times L. R. 272, 274.

action ? " Fry L.J. said : " Where the smallness of the damages indicated the view of the jury that the action ought not to have been brought, in my opinion ' good cause ' to deprive the plaintiff of costs existed." In *O'Connor* v. *Star Newspaper Co.* (1) Bowen L.J. said : " The smallness of damages is not of itself always conclusive. Speaking for myself only, I am inclined to think that when one farthing is given as damages for a libel, there is prima facie reasonable ground for saying that there was no good cause for bringing the action." The views expressed by Bowen L.J. seem to me to indicate the sound rule to be applied by the Court in the absence of any special facts which may explain the award of contemptuous damages. It must be remembered that an action for defamation is one in which the considerations of character, conduct and reputation are peculiarly relevant, and that they are to be viewed in relation to the circumstances of publication and the general facts of the case. Here I may mention that the publications complained of in the present case were made to personal friends of the plaintiff under the circumstances shown in the evidence.

It is not possible satisfactorily to enumerate the special circumstances which may lead the Court to refuse a defendant's application to deprive a plaintiff of costs where trivial damages for defamation have been given by a jury. I see that in *Macalister* v. *Steedman* (2) Bucknill J. refused to deprive a plaintiff of his costs, though the jury had found one farthing damages only. He apparently based his decision to a large extent on the fact that the jury found that the defendant had acted with express malice. This, I think, may be a matter of distinct relevance. There was no suggestion in the case now before me that the defendant had acted maliciously. I see too that under special circumstances Huddleston B. in *Myers* v. *Financial News* (3) not only deprived the plaintiff, who had been awarded a farthing damages by the jury in an action of libel, of his

(1) 68 L. T. 146, 148. (2) (1911) 27 Times L. R. 217.
(3) (1888) 5 Times L. R. 42.

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costs, but also directed him to pay the costs of the defendants. Many decisions on the point, I may mention, are collected and discussed in Mr. Gatley's excellent treatise on the Law of Libel and Slander. It is desirable that I should refer to three of them. The first is *Williams* v. *Ward* (1) in the Court of Appeal, which indicated one aspect of the matter which may arise in defamation actions. There the defendant had published a serious libel of (as Lord Esher said) "a multifarious kind." It made many charges against the plaintiff. The Court said that the jury must have thought that all the substantial allegations were proved and that the charges made by the defendant were true except in some small and insignificant particulars. The Court therefore took the view that the action was oppressive, and thus that "good cause" existed within Order LXV., r. 1. The verdict in that case was apparently a general one, whereas in the case before me the jury gave a number of findings and not a general verdict. But if, as in the case before me, the jury gives the repeated award of contemptuous damages, even though some of the slanders were of the most serious nature, I confess I can see no distinction in principle between *Williams* v. *Ward* (1) and the present action. The next decision I cite is *Nicolas* v. *Atkinson* (2), where Phillimore J. said that his recollection was that in the more recent cases no costs had been given where damages were only a farthing. My own recollection agrees with that of the learned judge, who is now Lord Phillimore. The final decision I cite is a case which throws, I feel, much light on the matter, and which falls into line, not only with *Williams* v. *Ward* (1), but with the earlier cases which establish the principle on which Order LXV., r. 1, is to be applied, not only generally but particularly with respect to actions of defamation. I refer to the *Red Man's Syndicate* v. *Associated Newspapers, Ld.* (3) In that action of libel the jury found one farthing damages only. Phillimore J. pointed out that where a farthing damages was given in a personal action for defamation,

(1) (1886) 55 L. J. (Q. B.) 566. (2) (1909) 25 Times L. R. 568.
(3) (1910) 26 Times L. R. 394.

it generally meant that a wrong had been suffered, but that owing to the nearness of the statements to the truth the wrong was so slight that a farthing covered the damage, or that the plaintiff's general character was so bad that it had not suffered further substantial damage by the libel or slander. In either case he thought that a defendant should not be called upon to pay the plaintiff's costs, and he therefore made an order under Order LXV., r. 1, depriving the plaintiff of them. The underlying principle of this seems to be that in such cases the action should be regarded as oppressive and as one that should not have been brought, and that therefore "good cause" exists.

Recognizing as I do that each case must depend on its own particular facts, I am satisfied in the present action that I ought to make an order depriving the plaintiff of costs. I have no doubt that the verdict of the jury meant, either that the statements made were so nearly true that ignominious damages would suffice, or that the plaintiff's character was so bad that contemptuous damages should be given. This I think is the basic explanation of the assessment by the jury, after the fullest deliberation, of one farthing damages only upon each head of claim, including the charges of felony. Nor do I doubt that the jury took the view that in any event the conduct of the plaintiff had been open to the gravest suspicion, that it called for severe condemnation, and that the plaintiff had brought the defamation upon himself. In my opinion the jury were amply warranted, upon the circumstances revealed at the trial, in assessing the damages at the smallest sum that could be given.

I make an order depriving the plaintiff of costs.

The judgment will be entered for $1\frac{3}{4}d.$, without costs.

Judgment accordingly.

Solicitors for plaintiff: *Peter Thomas & Clark.*

Solicitors for defendant: *Shield & Mackarness.*

F. C.

C. A.

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July 6, 7, 8, 23.

[IN THE COURT OF APPEAL.]

W. H. MULLER AND COMPANY (LONDON), LIMITED *v.* LETHEM (Inspector of Taxes).

W. H. MULLER AND COMPANY (LONDON), LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Excess Profits Duty—Foreign Shipping Company—Exercise of Trade within United Kingdom—Agents—Sub-agents—Profits arising from Contracts by Residents and Non-residents for Shipment of Goods—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. D.*—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 31, *sub-ss.* 2, 7.

Two Dutch shipping companies carried on a regular freight and passenger service to and fro between London and Rotterdam, carrying goods from England to Holland under bills of lading signed by a clerk of the appellants, W. H. Muller & Co. (London), Ld., who had been appointed agents in the United Kingdom by W. H. Muller & Co., who were the Dutch agents of the two shipping companies and who, in fact, controlled both those companies.

Assessments to income tax and excess profits duty having been made on the appellants as agents of the shipping companies in respect of the profits of their business of shipowners:—

Held, that in the circumstances the shipping companies were exercising a trade within the United Kingdom through the appellants as their regular agents.

Held also, the appellants not contesting the question of liability for the passenger traffic from London to Rotterdam:

(1.) that profits on contracts made in London for the shipment of goods from this country, whether the vendor had sold c.f.i. or f.o.b. by residents here, or by non-residents if the proceeds were received here by the agents, were taxable;

(2.) that profits on contracts made in London for the shipment of goods from Rotterdam to residents in the United Kingdom were also taxable; and

(3.) that profits on contracts for shipment of goods from Rotterdam to this country made between non-residents did not come into charge, unless the profits thereof were received in this country.

Maclaine & Co. v. *Eccott* [1926] A. C. 424 applied.

Appeal from a decision of Rowlatt J.

The appellants were a company registered in London. There were two Dutch shipping companies called the Nederland Steamboat Co. and the General Shipping Co., each owning two vessels with which it carried on a regular freight and

passenger service between London and Rotterdam and vice versa, the four vessels constituting what was known as the Batavier Line.

The two Dutch shipping companies had Dutch agents, a partnership firm of W. H. Muller & Co., to act as agents for them. Through those agents the appellants, W. H. Muller & Co. (London), Ld., were appointed in 1902 and 1904 to act as agents in the United Kingdom for the shipping companies respectively, and were expressly appointed to act as agents for the Batavier Line by an agreement of March 16, 1916.

A very considerable portion of the carrying voyage of the vessels was executed in English territorial waters, and also the shipment and delivery of goods, and contracts for carriage binding the shipping companies were made in the United Kingdom and the freight received therein, the companies carrying goods between England and Holland under bills of lading signed by a clerk of the appellant London firm for the master.

The Dutch firm of W. H. Muller & Co. managed the Batavier Line, but that firm had no independent agreements chartering the boats of the two shipping companies, the line being the line of those companies, and the Dutch firm being agents of the companies. The Dutch firm were the directors of the Nederland Steamboat Co. and had the control and management of that company. They were also the directors of the General Shipping Co. and had the general management of that company. The London company described itself on the shipping documents as "W. H. Muller & Co. (London), Ld., Batavier Line," and was an agent of the shipping companies.

Assessments were made by the Additional Commissioners of Income Tax for the City of London upon the London company as agents for the Nederland Steamboat Co. in the sum of 5000*l.* for the year ending April 5, 1916, and in the sum of 5000*l.* for the year ending April 5, 1917; and as agents for the General Shipping Co. in the sum of 5000*l.* for each of the same years, in respect of the profits of their business of shipowners.

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Assessments were also made by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., and subsequent enactments, to excess profits duty in the sums of 20,000*l.* for the accounting period of twelve months ending December 31, 1914, and 150,000*l.* for the like period ending December 31, 1915, upon the London company as agents for W. H. Muller & Co.'s General Shipping Co. in respect of the profits of its business as shipowners.

The London company appealed against all these assessments to the Commissioners for the Special Purposes of the Income Tax Acts, who heard the appeals on May 2, 1921, and their decision on the questions raised, taken from the cases signed by them on September 29, 1923, was as follows :—

"Dealing with the income tax assessments in question the General Shipping Co. and the Nederland Steamboat Co. were the owners of the vessels constituting the line known as the 'Batavier Line' and trading regularly between London and Rotterdam. The London company of W. H. Muller & Co. were appointed agents for the Batavier Line, and were commonly known and acted as agents for that line. We consider that the General Shipping Co. and the Nederland Steamboat Co. carried on a trade in the United Kingdom with the London company as their agents or managers and were chargeable to income tax in respect of profits arising from such trade in the name of the London company under s. 41 of the Income Tax Act, 1842, and s. 31 of the Finance (No. 2) Act, 1915. We do not think that their liability to be so charged is affected by the fact that the London company were in form sub-agents appointed by and accounting to the Dutch firm of W. H. Muller & Co. That firm were the duly appointed managers of the General Shipping Co. and the Nederland Steamboat Co.; they were authorized subject to the approval of those companies to appoint sub-agents wherever they deemed necessary; they or their members had a substantial interest in one at any rate of the two steamship companies; they were directors of both companies, and we regard the appointment of the sub-agents

as carrying with it the knowledge and approval of those companies.

As regards the extent of the liability, it is admitted that, if the above view is correct, the liability extends to profits arising from goods shipped from London c.i.f. and from passengers resident in the United Kingdom travelling from London to Rotterdam. It is contended that s. 31, sub-s. 7, of the Finance (No. 2) Act, 1915, excludes from liability the profits arising from goods shipped from London f.o.b. and from non-resident passengers returning to the Continent, on the ground that such profits arose from transactions carried out between non-resident persons. As regards non-resident passengers we think there is no liability, but as regards goods shipped from London we consider that the transactions were transactions with the consignors in this country and that there was liability to income tax in respect of the profits arising from such transactions prior to the passing of the Finance (No. 2) Act, 1915, although the machinery for making an assessment did not exist. We regard sub-s. 7 as inserted as a precaution to prevent any possible extension of the charge by s. 31 to business outside the United Kingdom.

The profits derived from the carriage of goods and passengers from Rotterdam to London do not in our opinion arise from a trade carried on in the United Kingdom.

We consider that excess profits duty is chargeable on the excess profits from the same transactions in respect of which we have held that there is liability to income tax. Some doubt arises upon this question in view of the decision in the case of the *Gillette Safety Razor, Ld.* v. *Inland Revenue Commissioners.* (1) We understand, however, that the ratio decided in that case was that the Boston company was not carrying on a trade in the United Kingdom and that s. 31 of the Finance (No. 2) Act, 1915, could not be applied so as to extend the scope of the charge to excess profits duty to a trade not carried on in the United Kingdom. In the present case the General Shipping Co. was, as already stated, in our view, carrying on a trade in the United Kingdom,

(1) [1920] 3 K. B. 358.

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both in the accounting period and in the pre-war period, and the whole of the profits of that trade were within the scope of the charge both to income tax and to excess profits duty, although the machinery of the Income Tax Acts prior to the passing of s. 31 of the Finance (No. 2) Act, 1915, did not enable them to be charged in the name of the London company in respect at least of the profits arising from goods shipped from London f.o.b. We have therefore come to the conclusion that there is nothing to prevent the application of s. 31, sub-s. 1, of the Finance (No. 2) Act, 1915, as machinery for the assessment and collection of excess profits duty on profits which were within the charge to duty independently of that section. Moreover, even if this view is not correct, the power to charge an agent for excess profits duty may be found in s. 45 without reference to s. 31 at all."

The London company appealed and the Crown entered a cross-appeal.

Rowlatt J. held that the shipping companies were carrying on a business within the United Kingdom; that the London company were agents of the shipping companies for the purposes of the Income Tax Acts; and that the appeal failed. In allowing the cross-appeal, Rowlatt J. held that the place of contract was the deciding factor and that the results of contracts made in the United Kingdom were brought into charge, but not those of contracts not so made, whichever way the transit of passengers and goods passed; that as to contracts made between non-residents, the London company had given up the question of the residence of passengers as being too troublesome to determine, but his Lordship held that f.o.b. contracts between non-residents involving carriage from this country to Holland were not excluded by s. 31, sub-s. 7, from liability to charge; that sub-section, in his Lordship's opinion, being introduced ex majore cautela for the purpose of making it clear that s. 31 did not make an agent assessable in respect of profits derived from a trade exercised outside the United Kingdom.

The London company appealed. The appeal was heard on July 6, 7, 8, and 23, 1926.

Latter K.C. and *A. E. Beecroft* for the appellants. The questions which arise are: Are the shipping companies exercising a trade within the United Kingdom? Are they making contracts here through the London company? Are the London company assessable as agents? We submit that the answer to each of these questions is in the negative, but if that is not so, then the appellants contend that they are not, by virtue of s. 31, sub-s. 7, of the Finance (No. 2) Act, 1915, assessable in respect of f.o.b. contracts between non-residents where the contract is made in this country.

The relevant provisions are s. 2 of the Income Tax Act, 1853, which provides for payment of duty in respect of profits arising from trade "exercised within the United Kingdom"; s. 41 of the Income Tax Act, 1842, which provides for charging non-residents in the names of their agents; and s. 31 of the Finance (No. 2) Act, 1915.

To make a non-resident liable, it is necessary that he should be actually carrying on a trade in the United Kingdom: *Grainger & Son* v. *Gough*. (1) Profits made by non-residents from a trade not exercised within the United Kingdom are not brought into charge under s. 31, sub-s. 2, of the Act of 1915: *Greenwood* v. *F. L. Smidth & Co.* (2) If a non-resident employs a buyer here that does not render the buyer assessable as an agent: *Sulley* v. *Attorney-General*. (3)

The question whether a foreign shipping company is trading within the United Kingdom has not come before the Court. The words of the Act are: "Exercising a trade within the United Kingdom." A shipowner calling at an English port and taking a cargo may be trading with, but not within, the United Kingdom. The trader must have a trading centre within the United Kingdom. *Grainger & Son* v. *Gough* (1) illustrates a trading with, and *Erichsen* v. *Last* (4) a trading within, the United Kingdom. Unlike the companies referred to by Sir George Jessel M.R. in *Erichsen* v. *Last* (4) these two companies have no offices in this country and merely call to deliver or pick up goods.

(1) [1896] A. C. 325.
(2) [1922] 1 A. C. 417.
(3) (1860) 5 H. & N. 711.
(4) (1881) 8 Q. B. D. 414.

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The London company are the agents not of the shipping companies but of the Dutch firm who appointed them as their agents, and an assessment cannot be made on the London company as agents for the shipping companies. There must be the direct relation of principal and agent between the parties assessed and the person employed. A sub-agency is not sufficient. The London company can only be called upon to account to the Dutch firm by whom they are employed; they are not accountable to the shipping companies. Unless it can be shown that the agent can be called upon to account by the firm sought to be assessed, he cannot be assessed within s. 41 of the Act of 1842, and s. 31, sub-s. 3, of the Finance (No. 2) Act, 1915. There must be a direct relationship between the parties, and that excludes the case of a sub-agent: *Lockwood* v. *Abdy* (1); *New Zealand and Australian Land Co.* v. *Watson.* (2) Even where the agent appoints an agent under an authority in that behalf, the latter does not become accountable to the principal, because there is no direct contractual relationship between them.

[SCRUTTON L.J. *New Zealand and Australian Land Co.* v. *Watson* (2) was distinguished and explained in *Kaltenbach, Fischer & Co.* v. *Lewis.* (3)]

The appellants do not contest the liability in respect of passengers from London to Rotterdam, as the question of residence would be too troublesome to be worth their while; but they do contend that they are not liable in respect of f.o.b. contracts made between non-residents where all moneys are collected abroad. The view taken by the Commissioners and Rowlatt J. of the effect of s. 37, sub-s. 1, of the Finance (No. 2) Act, 1915, cannot stand in the face of the decision in *Maclaine & Co.* v. *Eccott.* (4)

Sir Thomas Inskip S.-G. and *R. P. Hills* for the respondents. The first questions to be determined are: Are the two shipping companies trading within the United Kingdom? and, Are the London company agents for the two shipping companies? The answer to each question is "Yes."

(1) (1845) 14 Sim. 437.
(2) (1881) 7 Q. B. D. 374.
(3) (1885) 10 App. Cas. 617.
(4) [1926] A. C. 424.

Maclaine & Co. v. *Eccott* (1); *Greenwood* v. *F. L. Smidth & Co.* (2); *Wilcock* v. *Pinto & Co.* (3); *Werle & Co.* v. *Colquhoun* (4); and *Weiss, Biheller & Brooks, Ld.* v. *Farmer* (5) show conclusively that in the circumstances the two shipping companies are exercising a trade within the United Kingdom.

The London company are the agents of the shipping companies, for it is admitted that they sign bills of lading in London as agents of those companies. It is contended that they were only sub-agents and that there was no privity of contract; but if they were in fact acting as agents that is all that is required by s. 41 of the Act of 1842, which speaks of "any agent," and how the agent came to act as such does not matter. The section should be liberally interpreted, per Lord Parker in *Drummond* v. *Collins*. (6) The fact of their so acting makes the shipping companies liable. The London company were appointed as agents, and as soon as they acted as agents s. 41 becomes operative.

The Crown claims income tax in respect of all contracts made in London for carriage from Holland to London or from London to Holland. The place of contract is the important element. The Crown does not claim in respect of contracts made in Rotterdam for carriage thence to London.

In *Maclaine & Co.* v. *Eccott* (7) Lord Cave L.C., speaking of s. 31, sub-s. 7, of the Act of 1915, said: "Sub-s. 7, as I read it, provides that when one non-resident sells goods to another non-resident through the regular agent of the former in the United Kingdom and the proceeds of sales do not pass through the agent's hands, the agent shall not, in the absence of other circumstances which make him chargeable, be chargeable with the tax." In this case those other circumstances are present. Part performance in London; the making of the contract in London; the exercise of the trade in London; the carriage to and delivery of the goods in London; the appointment of agents in London, and the

(1) [1926] A. C. 424.
(2) [1922] 1 A. C. 417.
(3) [1925] 1 K. B. 30.
(4) (1888) 20 Q. B. D. 753.
(5) [1923] 1 K. B. 226; 8 Tax Cas. 381.
(6) [1915] A. C. 1011, 1019.
(7) [1926] A. C. 424, 435.

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receipt of the money here, are all or some of the additional circumstances in this case which, we submit, make the London company chargeable: *Crookston Bros.* v. *Furtado* (1) and *Wilcock* v. *Pinto & Co.* (2) afford illustrations of additional circumstances. Where the contract is made and performed or substantially performed in the United Kingdom, the non-resident is chargeable through his agent under s. 31, sub-s. 7. The exception to liability is in the case of f.o.b. contracts performed abroad where no money is paid or received in this country.

Latter K.C. in reply.

Cur. adv. vult.

July 23. Lord Hanworth M.R. A person, whether a British subject or not, although not resident in the United Kingdom is chargeable to income tax from profits or gains arising or accruing to him from any trade exercised within the United Kingdom, and by s. 41 of the Act of 1842, such a person is made chargeable to this income tax in the name of any agent having receipt of any profits or gains arising as therein mentioned. By s. 31, sub-s. 1 (*b*), of the Finance (No. 2) Act, 1915, that liability was extended "so as to make non-resident persons so chargeable although the . . . . agent . . . . may not have the receipt of the profits or gains of the non resident."

By sub-s. 6 that general extension was confined, and was not to "render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent, not being an authorised person carrying on the non-resident's regular agency, or a person chargeable as if he were an agent in pursuance of this section in respect of profits or gains arising from sales or transactions carried out through such a broker or agent."

The assessment here disputed is an assessment to income tax. The appellants are a company registered in London. There are two Dutch shipping companies, called the Nederland Steamboat Co. and the General Shipping Co., which, together, are known as the Batavier Line.

(1) 1911 S. C. 217; 5 Tax Cas. 602. (2) [1925] 1 K. B. 30.

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These two companies have Dutch agents to act as agents for the companies. Through these agents the appellants were appointed in 1902 and 1904 to act as agents over here in the United Kingdom for the shipping companies respectively, and were expressly appointed to act as agents for the Batavier Line by an agreement dated March 16, 1916.

It appears to me quite unnecessary to restate the facts which were found in the case stated by the Commissioners and are recounted by Rowlatt J. in his judgment. It is sufficient to say that in my judgment it is clear that the appellants are authorized persons carrying on the non-residents'—that is the two shipping companies'—regular agency; and I agree that the decision in *Erichsen* v. *Last* (1) is closely relevant to this case, as showing that the shipping companies carried on business in this country through the appellants as their regular agent. No successful argument therefore can be maintained, as was attempted, upon the restrictive effect of sub-s. 6 of s. 31, for the appellants were "regular" agents.

There remains, however, the important and difficult question—what is the measure of the non-resident's liability in respect of business carried on in this country? The difficulty is enhanced by the terms of sub-ss. 2 and 7 of s. 31, which are as follows: "(2.) A non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under section forty-one of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver, or manager." "(7.) The fact that a non-resident person executes sales or carries out transactions with other non-residents in circumstances which would make him chargeable in pursuance of this section in the name of a resident person shall not of itself make him chargeable in respect of profits arising from those sales or transactions."

It was held in *Greenwood* v. *F. L. Smidth & Co.* (2) that sub-s. 2 is not a charging section, and only declared and

(1) 8 Q. B. D. 414. (2) [1922] 1 A. C. 417.

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comprised the effect of s. 41 of the Act of 1842 as extended by sub-s. 1 of s. 31 of the Finance (No. 2) Act, 1915, as to the non-resident's liability in the name of the factor or agent. In that case the profits of business concluded in Copenhagen, although with purchasers in the United Kingdom, were held not assessable under Sch. D, the effect of which was not held to be extended by s. 31, so as to include them.

It would thus appear that the profits now liable to assessment must be such as would have been assessable under s. 41 through an agent in the United Kingdom, subject to this, that s. 31, sub-s. 1 (*b*), has removed the limitation that such profits must actually be received into the hands of the agent resident here. *Weiss, Biheller & Brooks, Ld.* v. *Farmer* (1) is an illustration of what may be profits arising from a trade exercised within the United Kingdom; while *Sulley* v. *Attorney-General* (2), *Grainger & Son* v. *Gough* (3), which were applied in *Greenwood* v. *F. L. Smidth & Co.* (4), offer illustrations of the reverse.

It is not so easy to determine the meaning of "sales and transactions" in sub-s. 7 from a consideration of these cases. In *Maclaine & Co.* v. *Eccott* (5) the House of Lords has expounded the principles which sub-s. 7 embodies. The Lord Chancellor determined the effect of the section to be that "when one non-resident sells goods to another non-resident through the regular agent of the former in the United Kingdom and the proceeds of sales do not pass through the agent's hands, the agent shall not, in the absence of other circumstances which make him chargeable, be chargeable with the tax." This is reinforced by Lord Shaw (6), who says that where there is neither one of the parties of the transaction in this country, and when the goods never reach this country but are sent direct from one foreign country to another, the agent conducting the business in London has no vicarious responsibility for the taxation.

(1) [1923] 1 K. B. 226; 8 Tax Cas. 381.
(2) 5 H. & N. 711.
(3) [1896] A. C. 325.
(4) [1921] 3 K. B. 583; affirmed [1922] 1 A. C. 417.
(5) [1926] A. C. 424, 435.
(6) Ibid. 442.

Putting it the other way, those passages appear to me to mean affirmatively, that when a contract is made here through the agent between non-residents, the old position under s. 41 is reverted to and liability can only be imposed if the agent here receives the profits or gains.

There is still room for question as to what is the precise meaning of "executes sales or carries out transactions." The Lord Chancellor says (1) that they must be given a wide meaning, so as to include the actual contracts of sale. Lord Shaw's words appear to indicate that that part of the transaction that may found liability, in what he succinctly terms double foreigner business, may be either the handling of the goods or the payment of the price in this country. In *Wilcock* v. *Pinto & Co.* (2) the Court of Appeal held that a firm was exercising a trade in England, where the contracts were made and the price was payable for them in England.

Applying the above considerations to the trade in the present case, where there is now no question raised as to the passenger traffic, profits on contracts made here for the shipment of goods from this country, whether the vendor has sold f.o.b. or c.f.i., by residents here, or by non-residents, are taxable if the proceeds are received here by the agents. Profits on contracts made here for the shipment of goods from Rotterdam to residents in the United Kingdom are liable. Profits on contracts for shipment of goods from Rotterdam to this country made between non-residents are not within the charge, unless the profits thereof are received in this country.

The Commissioners must reconsider the facts before them in the light of the decision of this Court, and the case must be remitted to them for this purpose. The substance of the appeal, however, fails, and it must be dismissed with costs.

SCRUTTON L.J. Since s. 31 of the Finance (No. 2) Act, 1915, allowed non-resident traders to be assessed under Sch. D, as trading in the United Kingdom, in the names of certain agents, though the agents were not in receipt of the

(1) [1926] A. C. 436. (2) [1925] 1 K. B. 30.

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profits and gains of the trade, the Courts have had considerable difficulty in deciding the exact circumstances under which such foreign traders can or cannot be effectively taxed. In *Pinto's* case (1) and *Maclaine & Co.* v. *Eccott* (2) the Courts have considered the case of the foreign trader who sells goods in England, and I do not repeat my judgments in those cases on the subject of exercising a trade. The present cases, and *Nielsen, Andersen & Co.* v. *Collins* (3), in which we have recently given judgment concerning the liability of a Danish shipping company, "Det Forenede," assessed in the name of its regular agents in Hull and Newcastle respectively, raise the question of the position of foreign shipowners regularly running lines of ships to England.

First, do they exercise a trade in England or merely trade with England ? In my view, on the facts in this case, coupled with the decision in *Erichsen* v. *Last* (4), they clearly exercise a trade in England. The steamers of the two Dutch companies concerned carry goods from London to Rotterdam and vice versa. A very considerable portion of the carrying voyage is executed in English territorial waters, as are the shipment and delivery of goods ; and contracts for carriage binding the shipping companies are made in the United Kingdom and freight received therein. This, in my view, is exercising a trade in the United Kingdom, and so Sir George Jessel clearly thought in his judgment in *Erichsen* v. *Last.* (4)

But, secondly, it is said that the Dutch shipping companies have no agents here to be assessed. It is contended that Messrs. Muller & Co. (London), Ld., are really agents of a Dutch partnership firm of W H. Muller & Co., and not of the Dutch shipping companies. There is, in my view, no foundation for this. The Dutch firm are the sole directors of one shipping company and the managing directors of the other. The shipping companies carry goods between England and Holland under bills of lading signed by a clerk of the London firm for the master. As regards the Nederland Co.,

(1) [1925] 1 K. B. 30.
(2) [1926] A. C. 424.
(3) (1926) 42 Times L. R. 704.
(4) 8 Q. B. D. 414.

the London firm took over the business in this country formerly carried on by the Nederland Co. themselves. As regards the General Shipping Co., the Dutch firm are both directors and shipping agents. The boats of the two companies run together in the Batavier Line, which the Dutch firm manage, but the Dutch firm have no independent agreements chartering the steamers of the shipping companies, and in my view the line is the line of the shipping companies, and the Dutch firm is merely an agent of the shipping companies, and their combination is the Batavier Line. The London company describes itself on the shipping documents as "W. H. Muller & Co. (London), Ld., Batavier Line," and in my opinion it is right and is an agent of the shipping companies, who, subject to the third point, are rightly assessed in its name.

The third point relates to the position of the London firm under the provisions of s. 31, sub-s. 7, of the Finance (No. 2) Act, 1915, now reproduced as r. 11 of the General Rules in the Income Tax Act, 1918. As the case relates to assessments for the years 1916, 1917, 1918, it falls to be determined under the provisions of the earlier Act. It is regrettable, however, that an assessment for 1916 should only reach the Court of Appeal in 1926; and equally regrettable that though the appeal to the Commissioners came on in May, 1921, the special case was not stated until September, 1923, and the appeal has taken nearly two years from signing the case to reach Rowlatt J., and nearly three years to reach the Court of Appeal. It cannot be to the advantage of the State or the subject that proceedings in revenue cases should be so dilatory. I do not know where the blame lies, but I blame the whole system; and in particular I think that if the Commissioners would, as commercial arbitrators do, state the case themselves, instead of leaving the parties to wrangle about it, much time would be saved. The Commissioners can, if necessary, require the contentions of the parties to be delivered in writing at the time of the hearing, to secure greater accuracy.

At the time when the case was before the Commissioners no decision had been given as to the meaning of s. 31, sub-s. 7,

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of the Finance (No. 2) Act, 1915. The Courts below were not sure what it meant, or whether it had any meaning. The Commissioners regarded it as merely a precaution to prevent any extension of the liability enforced by assessment under s. 31 to business outside the United Kingdom. The parties desired to raise the question of what they called profits arising from shipment f.o.b. and profits arising from shipment c.f.i. This use of language seems to me merely misleading. The shipowner's contract has nothing to do with f.o.b. or c.f.i.; those are terms relating to contracts for the sale of goods between vendor and purchaser. They have this indirect relation to the contract of carriage, that in the sale of goods f.o.b. it is the purchaser's duty to find the ship or shipping room, though as a matter of business the vendor frequently does it on behalf of the purchaser, a transaction which may result in both vendor-shipper and purchaser-consignee being liable to the shipowner for freight. See as to this the statement of Parke J. in *Domett* v. *Beckford* (1) and the decision in *Shepard* v. *De Bernales* (2), that on a bill of lading containing a clause "to be delivered to consignee he or they paying freight for the same," the shipper was liable for freight if the master delivered to the consignee without insisting on his lien for freight. On the other hand, when the vendor sells goods c.f.i., the consignee usually pays the freight on delivery, deducting it from the price he has to pay to the vendor. When the Commissioners say: "If the goods were shipped c.i.f. the freight was collected by the London company; if the goods were shipped f.o.b. the freight was collected by the Dutch firm on arrival of the goods at Rotterdam," they are not making any statement depending on the nature of the transaction expressed as f.o.b. or c.f.i., which terms I do not imagine are ever mentioned to the shipowner, but may be making an inaccurate statement of a relation which probably depends on the filling in by the shipper of the question in the consignment note: "Who pays freight?" a question to which the answer "The consignee" would not, under *Shepard* v. *De Bernales* (2),

(1) (1833) 5 B. & Ad. 521. (2) (1811) 13 East, 565.

necessarily free the shipper from liability. However that may be, the Commissioners decided that for profits arising from goods shipped from London c.i.f. and passengers resident in the United Kingdom travelling from London to Rotterdam there was liability to be assessed in the name of the English agent, as also for profits arising from goods shipped from London f.o.b. on the ground that these were transactions with the shipper in this country, but no liability to be assessed for profits arising from non-resident passengers returning to the Continent. They also held that there was no liability to assessment for profits derived from the carriage of goods or passengers from Rotterdam to London.

Rowlatt J., when both sides appealed, said that while sub-s. 7 was difficult to understand he thought it was inserted ex majore cautela to prevent an agent being assessed because he took some small share in carrying out a contract made abroad between two non-residents, and he held that the material question was: "Where were the contracts made?"; that the profits from contracts made in England were assessable, wherever the freight was payable, and the profits from contracts made in Holland were not assessable. So far no one had treated sub-s. 7 as more than a negligible precaution. But on appeal to the House of Lords (*Maclaine & Co.* v. *Eccott* (1)) we learnt that we were all wrong. I am not sure that Lord Shaw's view is the same as that of the Lord Chancellor on a point I will mention, but I take the Lord Chancellor's view, concurred in by three other members of the House, as the decision of the House of Lords. He expresses it thus (2): "I have come to the conclusion that its intention and effect is to exempt from taxation in the name of a resident agent or other person in the position of an agent all sales and transactions between non-residents, even though effected through the medium of that agent or other person, except in cases where the agent or other person receives the profits." Then lower down the page: "Sub-s. 7, as I read it, provides that when one non-resident sells goods to another non-resident through

(1) [1926] A. C. 424. (2) [1926] A. C. 435.

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the regular agent of the former in the United Kingdom and the proceeds of sales do not pass through the agent's hands, the agent shall not, in the absence of other circumstances which make him chargeable, be chargeable with the tax." I understand the effect of this to be that the phrase in sub-s. 7 of s. 31 "executes sales or carries out transactions" includes "making contracts," but that an agent making contracts here for non-residents is only assessable if he receives the profits of such trading. I am not sure that Lord Shaw concurs in the latter limitation.

Now obviously the Commissioners have not approached the matter from this point of view at all, and I have considered whether the proper course is not simply to send the case back to them to find facts and state their conclusions, having regard to the new situation created by the House of Lords decision. But as the case may go higher and there seems to have been some misunderstanding as to the shipping transactions involved, I think it better to state my own views for the approval or disapproval of the House of Lords or the guidance of the Commissioners. The shipowners are indifferent about the passenger question, as I gather the trouble of inquiring into residence is much more than the tax involved; but they attach importance to the question about the carriage of goods.

Sub-s. 7 of s. 31 of the Finance (No. 2) Act, 1915, reproduced in r. 11 of the General Rules to all Schedules of the Income Tax Act, 1918, according to the decision of the House of Lords, protects a non-resident trading in England from being assessed, so far as that trade consists of contracts between two non-residents, in the name of his agent here, unless that agent is in receipt of the profits of such transactions. But this section does not apply if one party to the contracts constituting the trade is a resident, and where the shipowner's resident agent is himself liable on the contract, or where the resident shipper, though making the contract on behalf of a non-resident consignee, is himself liable on the contract, the sub-section does not seem to give any protection. To judge in this case whether these considerations affect

the matter one would want to see the completed documents, and not merely the blank forms with which we were supplied.

Further, it does not seem to me that Rowlatt J.'s division of profits according to where the contract is made is conclusive of the matter. For instance, a foreign firm of ferro-concrete constructors may make in Paris with an Englishman a contract to erect a hotel in England for payment to be made in England, and habitually have similar transactions. In such a case, in my view, the foreign firm would be exercising a trade in England though the contracts were made abroad. The fact that the contract is made in England is, however, almost conclusive that a trade is carried on here, but if neither party to the contract is a resident here assessment can only be made in the name of an agent who receives in England the profits of the transaction. In particular a contract for carriage made abroad between non-residents, of which a substantial part is to be performed in this country, including receipt of freight by an English agent, does not seem to get any protection from sub-s. 7, as explained by the House of Lords. A contract for shipment made in this country, the only parties to which are non-residents and the freight on which is payable abroad, does receive protection from the House of Lords decision; otherwise, if any party to such a contract is a resident, in which case it is immaterial where freight is payable. Contracts for shipment are neither f.o.b. nor c.f.i., and these terms should be confined to contracts of sale. In cases which are otherwise protected by sub-s. 7, the English agent must receive the profits of the transaction to render his foreign principal liable to assessment in the agent's name. It appears to me that these principles and the consideration of the completed documents should enable a just conclusion as to the amount in which the agent is assessable to be arrived at.

The matter must be remitted to the Commissioners to complete the assessment on the principles laid down by the House of Lords and in this judgment. As the appellants fail on their substantial contentions, they should bear the costs of this appeal.

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Romer J. The first question that has to be determined upon this appeal is whether two Dutch companies, referred to in these proceedings as the Nederland Steamboat Co. and the General Shipping Co. respectively, were prior to the years 1916 and 1917 exercising a trade within the United Kingdom. If that question be answered in the affirmative, the next question is whether the appellants W. H. Muller & Co. (London), Ld., were liable to be assessed to income tax in respect of the profits arising from the said trade for the years ending April 5, 1916, and April 5, 1917, as the agents of the two Dutch companies under the provisions of s. 41 of the Income Tax Act, 1842, and s. 31 of the Finance Act (No. 2), 1915. Finally, if both these questions are answered in the affirmative, it has to be determined whether in respect of any and what part of such profits the appellants are entitled to escape assessment by virtue of the provisions of sub-s. 7 of the last mentioned section.

The first of these questions can, I think, be dealt with quite shortly. Each of the two companies possesses two vessels with which it conducts a regular freight and passenger service between London and Rotterdam, the four vessels together constituting what is known as the Batavier Line. Contracts for the carriage of goods and passengers were at all material times being made in London; goods carried by the vessels were being constantly shipped or discharged, as the case may be, in London; payments for the carriage of both goods and passengers were constantly made in London and the very carriage itself took place for a considerable distance in the territorial waters of this country. In these circumstances I am satisfied that a trade was being exercised within the United Kingdom by both the Dutch companies to the extent at any rate of the carriage of goods and passengers in fulfilment of contracts made in this country, whether such goods and passengers were carried from London to Rotterdam or from Rotterdam to London. Whether the carriage of goods and passengers in fulfilment of contracts made outside the United Kingdom should also be regarded as constituting a trading within this country

is a question that we are not at present asked to decide.

The contention of the Crown as stated in the special case was that the two companies were chargeable in respect of profits derived from goods and passengers so far as the contracts for the carriage of such goods and passengers were made in the United Kingdom, and on the hearing of this appeal, counsel for the Crown were content to rest upon this contention, reserving, however, the right on some future occasion to contend that the two companies can properly be made chargeable in respect of the profits derived from the carriage of goods and passengers between Rotterdam and London even when arising on contracts made outside the United Kingdom. As to this I express no opinion.

I now turn to the consideration of the question whether the appellants, referred to in these proceedings as the English firm, were or were not the agents of the two Dutch companies. Now there is no doubt that the two companies were entering into contracts in this country for the conveyance in their vessels of passengers and goods, and that payment for such conveyance was being received in this country on their behalf. As the two companies were resident in Holland it seems obvious that those contracts must have been made and those payments received on their behalf by some agent of theirs in this country. In point of fact it was the English firm that made the contracts and received the payments on behalf of the two companies. This firm nevertheless contends that they were not the agents of either company. They put their case in this way. They say that the general agents of the two companies were a registered partnership firm resident in Rotterdam called W. H. Muller & Co., and referred to in these proceedings as the Dutch firm, that the English firm were merely the agents in this country of the Dutch firm, and that the relationship of principal and agent did not accordingly exist between them and the two companies, the Dutch firm and the Dutch firm alone being their principals. They say that in truth they were merely sub-agents of the two companies and are not assessable as agents of the two

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companies under either of the sections to which I have referred. But I am satisfied that the English firm were the direct agents of the two companies. On July 4, 1904, a letter was addressed to the English firm appointing them agents "for our Batavier Line," and this letter is signed by the Dutch firm as follows: "Wm. H. Muller & Co. (Batavier Line)." Now the Dutch firm were the director of the Nederland Steamboat Co., having the management and control of this company. They were also the director of the General Shipping Co., having the general management of that company and representing the company "in law and also outside the law." It is said that inasmuch as the Dutch firm were in addition the shipping agents and managers of the ships of the Nederland Co., and by a deed of June 29, 1899, they had been appointed "Exclusive agents and exclusive cargo superintendents" of the General Shipping Co. with power to charge commission for their services and to appoint sub-agents, the letter was written by them in those capacities. It seems to me, however, that the letter was written by the Dutch firm in their capacity of director of each company. For in their capacity of shipping agents and managers they could not properly refer to the Batavier Line as "our Batavier Line," nor should I have expected them in that capacity to sign as "Wm. H. Muller & Co. (Batavier Line)." But if they were writing as director of and therefore on behalf of the two companies both the description and the signature would be intelligible. There is not moreover any statement in the case to the effect that as shipping agents and managers of the ships of the Nederland Steamboat Co. the Dutch firm had any power to appoint sub-agents or sub-managers. But, however this may be, the matter is in my opinion concluded by the admission made by the English firm at the Bar that the two Dutch shipping companies were carrying goods from London to Holland under contracts binding on them signed by the English firm on their behalf. When once it is admitted that the English firm could sign contracts on behalf of the shipping companies and so as to bind these companies, it seems to me

necessarily to follow that the relation of principal and agent existed between each company and the English firm, and it is not material to inquire how or by whom or in what terms the agency was constituted. I am accordingly of opinion that the second question arising on this appeal ought to be answered in the affirmative.

In these circumstances the English firm are, in my opinion, and as held by Rowlatt J., liable to be assessed to income tax in respect of the profits accruing to the two Dutch companies from the carriage of goods or passengers effected in pursuance of contracts made in this country, except in so far as they are freed from chargeability by virtue of the provisions of sub-s. 7 of s. 31 of the Act of 1915. It was contended by the London firm when before the Special Commissioners that, having regard to this sub-section, they could not be assessed in respect of the profits accruing to the two Dutch companies from the carriage of goods shipped from London, where the goods had been sold, f.o.b., or from non-residents travelling from London to Rotterdam, the contract for carriage being according to their contention made in the first case between the non-resident shipping company and the non-resident consignee who, they say, would normally pay the freight, and in the second case between the non-resident shipping company and the non-resident passenger. When the matter came before Rowlatt J., however, the English firm did not press their claim to exemption in respect of the carriage of non-resident passengers, inasmuch as they preferred to be assessed in respect of the profits arising from such carriage sooner than engage in the impossible task of ascertaining in the case of each passenger whether he is or is not resident in this country. We are not therefore concerned with this class of traffic. But both before Rowlatt J. and before this Court they maintained their contention in relation to goods carried from this country to a consignee in Holland who had bought on f.o.b. terms. Rowlatt J. in rejecting that contention said that he thought the explanation of the sub-section given by the Solicitor-General was the correct one. That explanation in effect

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was that the sub-section had merely been introduced ex majore cautela for the purpose of making it clear that s. 31 did not make an agent assessable in respect of profits derived from a trade exercised outside the United Kingdom.

Since Rowlatt J.'s judgment, however, the sub-section has been considered and explained by the House of Lords in *Maclaine & Co.* v. *Eccott.* (1) Lord Cave in that case, after referring to the explanation of the sub-section given by the Solicitor-General in the present case when before Rowlatt J., said: "I do not think that this explanation gives proper effect to the words of the sub-section. The sub-section applies only to sales or transactions by a non-resident 'in circumstances which would make him chargeable in pursuance of this section in the name of a resident person'; and in the case of sales and transactions wholly made or entered into abroad, those circumstances do not exist. The sub-section must, therefore, apply to sales made here through an agent or other person resident here; and no construction can, I think, be accepted which makes it applicable only to sales made abroad." The Lord Chancellor then proceeded to state that the intention and effect of the sub-section were to exempt from tax in the name of a resident agent, or other person in the position of an agent, all sales and transactions between non-residents even though effected through the medium of that agent or other person except in cases where the agent or other person receives the profits, and a little later on he says: "Sub-s. 7, as I read it, provides that when one non-resident sells goods to another non-resident through the regular agent of the former in the United Kingdom and the proceeds of sales do not pass through the agent's hands, the agent shall not, in the absence of other circumstances which make him chargeable, be chargeable with the tax." The qualification that the agent does not receive the profits is not of course to be found stated in the sub-section in express terms. But the Lord Chancellor regarded the sub-section as in no way qualifying or abridging the liability imposed by s. 41 of the Act of 1842 upon agents having

(1) [1926] A. C. 424, 434, 435, 436.

the receipt of profits or gains. He said: "It was held in *Smidth's* case (1) that s. 31 deals with machinery only, and that sub-s. 2 of the section was not to be construed as imposing a charge which did not previously exist; and, similarly, I do not think that sub-s. 7 was intended to remove any existing charge. The words 'make him chargeable' appear to mean 'make him so chargeable,' that is to say, chargeable in pursuance of the section in the name of a non-resident person." The sub-section is therefore addressed to the case of an agent who, but for it, would be assessable by reason only of s. 31, and it does not apply to an agent who was assessable under the law existing before the passing of the Act of 1915.

So far, therefore, as the English firm had the receipt of the profits arising from goods or passengers carried in pursuance of contracts made in this country, they would appear to be properly assessable to income tax in respect thereof by virtue of s. 41 of the Act of 1842, whether the contract for carriage be made on behalf of the carrying company with residents or non-residents. The contention of the English company in relation to the carriage of non-residents from London to Rotterdam must accordingly have failed even if it had not been abandoned, because the English firm would have received the fares, which necessarily included any profit derived from those fares. But in those cases of the carriage of goods where the freight was not received by the English firm they are entitled to resist assessment whenever the carriage was effected in pursuance of a contract made exclusively with a non-resident. It is true that having regard to one of the passages in the Lord Chancellor's judgment that I have cited above I ought to add to this statement the words "in the absence of other circumstances which made them chargeable." But I know of no circumstances that would make the English firm chargeable in such cases beyond the fact that a transaction consisting of the contract for carriage and of the carriage itself has been carried out by a non-resident shipping company, whose agents the British firm are, with another non-resident, and the sub-section, as construed by the House of Lords,

(1) [1922] 1 A. C. 417.

C. A. 1926

W. H. Muller & Co. (London) v. Lethem. Same v. Inland Revenue Commissioners.

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says that this of itself shall not make the shipping company chargeable. I think, therefore, that to this extent, but to this extent only, the appellants are entitled to succeed. We are not, however, in possession of materials sufficient to enable us to judge whether there are any cases in which, the freight not being received by the London firm, the contract for the carriage of the goods by the shipping company was made exclusively with non-residents. This is a matter which can only be satisfactorily determined by the Commissioners, and for this purpose the assessment must be remitted to them.

As, however, the appellants fail in all other respects, the costs of the appeal should be borne by them.

Lord Hanworth M.R. Both appeals are dismissed with costs, and each case, the one relating to income tax and the other to excess profits duty, is remitted to the Commissioners.

Appeals dismissed.

Solicitor for the appellants: *C. J. Sharpe.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

R. M.

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Jan. 11, 12;
Feb. 3.

PALMER *v.* CRONE and Others.

[1925. P. 2481.]

Justices—Jurisdiction—Order in Excess—Illegal Distress—Erroneous Decision as to Jurisdiction on Question of Fact—Liability in Action for Trespass—Justices Protection Act, 1848 (11 & 12 *Vict. c.* 44), *ss.* 1, 2—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 1, 2.

Sects. 1 and 2 of the Poor Rate Assessment and Collection Act, 1869, provide that "the occupier of any rateable hereditament let to him for a term not exceeding three months" shall not be "compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year."

The poor rate payable in respect of a dwelling-house of which the plaintiff was weekly tenant was 5*l.* 10*s.* a year. A demand note for a half-year's rate, namely 2*l.* 15*s.*, was served on the plaintiff, but he failed to pay the money and a summons was issued against him. The plaintiff did not appear before the justices, who refused to hear

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his landlord's daughter on his behalf. Evidence having been given on the part of the overseers, the justices issued a distress warrant against the plaintiff's goods, although, before they signed the warrant, the landlord's daughter had addressed them again and intimated that the plaintiff was a weekly tenant, a fact of which one of the justices was aware. Goods of the plaintiff were seized and sold at auction under the warrant. The distress being illegal by ss. 1 and 2 of the Poor Rate Assessment and Collection Act, 1869, the plaintiff brought an action for trespass against the justices, claiming damages for wrongfully issuing the warrant:—

Held, that, although, if the full facts had been proved, it would have been apparent to the justices that they had no jurisdiction to issue the warrant, they were not liable in the action, since they ought to consider only facts known to them in their judicial capacity from materials properly before them, and they had acted correctly in point of law on the evidence which had been so proved.

Calder v. *Halket* (1839) 3 Moo. P. C. 28 applied.

ACTION tried by Talbot J. and a common jury.

The following statement of facts is taken from the judgment:—

"The action was brought to recover damages for an illegal distress of the plaintiff's goods. The defendants were John Smyth Crone and Philip Hewlett, two justices of the peace for the county of Middlesex; the overseers of the poor for the parish of Willesden; James Carless, a constable; and Flood & Sons, a firm of auctioneers. The two justices were sued for wrongfully issuing the warrant which authorized the distress; the overseers for seizing the plaintiff's goods by their servant or agent, Carless; and Flood & Sons for selling the goods so seized. The defendants, other than the two justices, relied on the Constables Protection Act, 1750 (24 Geo. 2, c. 44). Sect. 6 of that Act protects any 'constable, head-borough or other officer,' and any one 'acting by his order and in his aid,' against any action 'for anything done in obedience to any warrant under the hand or seal of any justice of the peace,' until a demand 'of the perusal and copy of such warrant' has been made in the manner prescribed by the Act, 'and the same hath been refused or neglected for the space of six days. . . .' It has been decided in *Nutting* v. *Jackson* (1) and in *Harper* v.

(1) (1773) 1 Bott's Poor Laws, 5th ed., p. 325.

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Carr (1) that overseers are officers within the protection of this statute, and the other defendants who raise this defence are clearly persons acting by their order. It was admitted that the demand required by the statute as a condition precedent to an action against these defendants was not made, and I, therefore, gave judgment for them at the hearing.

"The case was tried with a jury. The facts admitted or found by the jury may be stated shortly as follows. The plaintiff was at all material times weekly tenant to one Rush of the ground floor of a house known as 37 Lichfield Gardens, Willesden Green. Mr. Rush's daughter, Miss Winifred Rush, took an active part in managing her father's house property. On April 3, 1924, a poor rate was duly made for expenses to be incurred up to the end of March, 1925, leviable in two instalments, the second of which fell due in October, 1924. A demand note for this second instalment, 2*l.* 15*s.*, was duly served on the plaintiff in November, 1924. This sum not having been paid, a summons dated February 5, 1925, was served on the plaintiff for February 14. The plaintiff or his wife handed the summons to Miss Rush, who said (in effect) that they need not worry about it but that she would see to it. The plaintiff accordingly did not appear on February 14, when his case, and between forty and fifty similar cases, were dealt with by the two defendant justices. At the commencement of the proceedings Miss Rush claimed to be heard on behalf of the plaintiff and other tenants of her father, but, objection having been taken, the justices declined to hear her. Evidence having been given on the part of the overseers, the defendant justices signed and issued the distress warrant. The jury found that Miss Rush did not, when applying to be heard, intimate to the justices that the plaintiff was a weekly tenant, but that she did intimate that fact at the end of the proceedings in the presence of both justices and before the warrant was signed. One of the justices was in fact aware that the plaintiff was a weekly tenant. On May 13, 1925, furniture of the plaintiff

(1) (1797) 7 T. R. 270.

was seized and removed under the warrant, and on May 25 it was sold by auction. The plaintiff appealed to quarter sessions under s. 7 of the Poor Relief Act, 1743 (17 Geo. 2, c. 38), on July 20, 1925. The appeal was allowed, but costs were refused on the ground that the contention that the distress was illegal had not been raised by the plaintiff before the justices."

At the conclusion of the hearing before the jury Talbot J. reserved judgment on the question of the liability of the defendant justices.

W. Rutherford and *A. E. Phelps* for the plaintiff.
Konstam K.C. and *Villiers Bayly* for the defendant justices.
Monier-Williams for the other defendants.

Cur. adv. vult.

Feb. 3. TALBOT J. read a written judgment in which he stated the facts as set out above and continued: The contention that the distress warrant issued by the defendant justices was illegal depends on the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), by which, under ss. 1 and 2, the occupier of any rateable hereditament let to him for a term not exceeding three months shall not be compelled to pay to the overseers at one time or within four weeks a greater amount of the poor rate than would be due for one quarter of the year. It has been decided in *Hammond* v. *Farrow* (1) that a weekly tenant is a tenant for a term not exceeding three months within this statute. The poor rate on the plaintiff's tenement for the year in respect of which the distress in question was levied was 5*l.* 10*s.*, a quarter of which is 1*l.* 7*s.* 6*d.*, and it follows that a distress for 2*l.* 15*s.* was in fact contrary to the statute. The demand for the half-year's rate was good: *Walton-on-the-Hill Overseers* v. *Jones* (2), but if the plaintiff had proved before the justices that his tenancy was a weekly one it would have been their duty to issue a warrant for

(1) [1904] 2 K. B. 332. (2) [1893] 2 Q. B. 175.

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1*l.* 7*s.* 6*d.* only: *Mansel* v. *Itchen Overseers.* (1) Moreover, as between these parties, that the distress warrant was wrongly issued is res judicata by the judgment of the quarter sessions.

The question remains whether the defendant justices are liable to the plaintiff in an action of trespass for issuing the warrant. If they are, the damages found by the jury are 50*l.* Their first defence was that, whatever was in fact their knowledge on the subject, and although Miss Rush did inform them of the fact before the warrant was actually issued, they were not entitled to regard anything not regularly proved on oath before them, and that, the plaintiff not having called any evidence, and, indeed, not having appeared to claim the protection of the statute, they did right, and not wrong, in issuing the warrant. Apart from the judgment of quarter sessions, this appears to me to be right: see *Reg.* v. *Tompkins* (2), but, as I have said, the question is, in my opinion, res judicata, and this point is not open to the defendants.

They next rely on the Justices Protection Act, 1848 (11 & 12 Vict. c. 44). The effect of s. 1 is that in an action against a justice "for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice," malice must be alleged and proved. The plaintiff, on his part, denies that in issuing the warrant the justices acted within their jurisdiction. He says that, on the contrary, they acted without jurisdiction, and that, having been injured by what they did, he has, by s. 2, the same right of action, without alleging or proving malice or want of reasonable and probable cause, as he would have had before the passing of that Act. It is unnecessary to consider the provisoes to s. 2 of the Act, as it is admitted that they do not apply to this case. The principle of the law on this matter is plain. If a judicial officer acts outside his jurisdiction he is not acting as a judicial officer at all, and he is in no better position than any one else. But it does not follow, because the enforcement of an order of a

(1) [1906] 1 K. B. 221. (2) (1867) 31 J. P. 470.

Court of limited jurisdiction will be prevented on the ground that in fact the matter was not within that limited jurisdiction, that an action lies against the judges of that Court for something done in obedience to the order: see per Blackburn J. in *Pease* v. *Chaytor*. (1) There are many cases which illustrate this distinction. If justices have before them a matter apparently within their jurisdiction, and then it is alleged that, because of some fact collateral to the merits of the case, they have no jurisdiction, although they must inquire into the truth of the fact alleged to see whether they are to proceed or not, their decision upon that question is always open to review by the High Court, and will be corrected if erroneous by the appropriate writ: see *Bunbury* v. *Fuller* (2) and *Rex* v. *Bradford*. (3) But in an action of trespass the justices are not liable, because they have come, on evidence properly before them, to an erroneous decision as to their jurisdiction on a question of fact: *Calder* v. *Halket* (4), although it is otherwise if upon the facts as found they have decided wrongly in point of law: *Houlden* v. *Smith*. (5) So, in the present case, if the plaintiff had appeared before the justices, and it had been proved or admitted that he was a weekly tenant and they had nevertheless issued a distress warrant for 2*l*. 15*s*. poor rate, they would have been liable in damages for the distress levied under it inasmuch as by the Act of 1869 they had no jurisdiction to issue it. But, in fact, there was before them evidence sufficient, prima facie, to found their jurisdiction, and no evidence of any fact ousting their jurisdiction. They acted correctly in point of law on the evidence before them and are, therefore, not liable in an action, because the true facts were not proved: *Pease* v. *Chaytor* (6), following *Lowther* v. *Earl Radnor* (7); *Pike* v. *Carter*. (8) The justices were, in my opinion, right in disregarding statements made to them irregularly, and the finding of the jury regarding what was said to them by Miss Rush is, therefore, immaterial. What is said in some of the cases as to facts

(1) (1863) 3 B. & S. 620, 640–644.
(2) (1853) 9 Ex. 111, 140.
(3) [1908] 1 K. B. 365.
(4) 3 Moo. P. C. 28, 77.
(5) (1850) 14 Q. B. 841.
(6) 3 B. & S. 620, 643.
(7) (1806) 8 East, 113.
(8) (1825) 3 Bing. 78.

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which were known to the justices, or which they had the means of knowing, refers, I think, to knowledge, or means of knowledge, which they had in their judicial capacity, that is, based on materials regularly before them.

Judgment must be entered for all the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiff: *W. Drake & Co.*

Solicitor for defendant justices: *C. W. Radcliffe.*

Solicitors for other defendants: *Sharpe, Pritchard & Co., for E. A. Pratt, Kilburn.*

G. F. L. B.

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Feb. 28.

[GLAMORGAN ASSIZES.]

THE KING *v.* CORY BROTHERS AND COMPANY, LIMITED.

Criminal Law—Indictment—Corporation—Liability to Indictment for Felony or Crime involving personal Violence—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 33.

Sect. 33 of the Criminal Justice Act, 1925, which provides for the presentation to the grand jury at assizes or quarter sessions of a bill of indictment against a corporation, and, if a true bill is returned, for the trial of the corporation thereon, is mere machinery to avoid the inconvenience arising from the fact that previously a corporation could not be indicted at assizes, and does not alter the substantive law so as to render a corporation liable to be indicted where previously it was not liable.

An indictment was preferred at assizes charging a limited company with manslaughter and also with a misdemeanour under s. 31 of the Offences against the Person Act, 1861:—

Held, that the indictment must be quashed, as an indictment will not lie against a corporation either for a felony or for a misdemeanour involving personal violence under s. 31 of the Offences against the Person Act, 1861.

AN indictment was preferred at the Glamorganshire Winter Assizes holden at Cardiff against three individuals and a limited company, Cory Brothers & Co., Ld. They were charged in the first count of the indictment with manslaughter,

and in the second count with setting up, or causing to be set up, an engine calculated to destroy human life or inflict grievous bodily harm, with intent that the same or whereby the same might destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, contrary to s. 31 of the Offences against the Person Act, 1861.

Before any plea was entered on the record a motion to quash the indictment in respect of the company was made.

Norman Birkett K.C. (*Trevor Hunter* with him) for the company. The defendants are charged in the first count of the indictment with a felony and in the second count with a misdemeanour under s. 31 of the Offences against the Person Act, 1861. Those are offences for which a company cannot be indicted. Sect. 33 of the Criminal Justice Act, 1925, does not purport to effect an alteration of the law so as to render a corporation liable to be indicted where previously it was not liable. That section is mere machinery, and was intended to remove the difficulty which arose in *Rex* v. *Daily Mirror Newspapers*. (1) It merely provides that a corporation can be indicted at assizes or quarter sessions instead of the indictment having to be removed by certiorari into the King's Bench Division, as was formerly the practice. A corporation manifestly cannot be indicted for murder, as the only punishment provided for that crime is death. It is well settled law that no trial for felony can proceed in any English Court in the absence of the accused person, but it is provided in s. 33, sub-s. 3, that if a corporation does not appear by its representative the Court shall order a plea of not guilty to be entered, and the trial shall then proceed. This supports the view that the section was not intended to alter the existing law and make a corporation liable to be indicted for a felony. That section further contains no provision as to the right of the representative of a corporation to challenge jurors, which is a well established right of every accused person in cases of felony, and therefore does not purport to deal with that matter. It has been

(1) [1922] 2 K. B. 530.

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laid down in many cases that a corporation can be indicted for breach of duty, but cannot be indicted for felony or for offences against the person: *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1); *Reg.* v. *Great North of England Ry. Co.* (2); *Reg.* v. *Tyler* (3); *Pharmaceutical Society* v. *London and Provincial Supply Association.* (4) It is an implicit rule that mens rea is an essential ingredient of every crime of manslaughter or offence against the person: *Reg.* v. *Tolson* (5), but mens rea cannot be present in the case of an artificial entity like a corporation. In every case where a corporation has been convicted it has been in respect of an offence which has been prescribed and in regard to which the question of mens rea is immaterial, as for instance the selling of intoxicating drink to a person who is drunk.

Artemus Jones K.C. (*A. T. James* and *G. O. George* with him) for the Crown. The Criminal Justice Act, 1925, has now made a corporation an indictable entity. This is another development in the gradual process of placing an artificial entity like a corporation in the same position as a natural person as regards being amenable to the criminal law. Certain crimes, such as bigamy and rape, are obviously incapable of being committed by a corporation, but the Acts of the Legislature, as well as the practice of the Courts, have made serious encroachments upon the ancient doctrine of the common law that a corporation cannot commit a felony. The difficulty of proceeding against a corporation in the old days was twofold. One was the difficulty arising from procedure, because a corporation could only appear by attorney, whereas at assizes and quarter sessions the accused person was required to appear and plead to the indictment in person. The second difficulty was the difficulty of enforcing the judgment of the Court in days when the only punishment for felony was death. These difficulties of procedure and punishment furnished the reason for the repeated declarations of judges that a corporation could not be indicted for felony. In course of time the

(1) (1842) 3 Q. B. 223, 232.
(2) (1846) 9 Q. B. 315, 326.
(3) [1891] 2 Q. B. 588, 593.
(4) (1879) 4 Q. B. D. 313, 319.
(5) (1889) 23 Q. B. D. 168.

difficulty as to procedure was overcome by inventing the practice of removing the indictment against a corporation into the civil side of the King's Bench Division, where a corporation could appear and plead by attorney, and now s. 33 of the Criminal Justice Act, 1925, provides that a bill of indictment against a corporation can be presented to the grand jury at assizes or quarter sessions, and that if a true bill is returned the corporation may by its representative enter a plea of guilty or not guilty, and if the corporation fails to appear or to enter a plea the Court shall order a plea of not guilty to be entered, and the trial shall then proceed. By so enacting the Legislature must have contemplated that a corporation is capable of committing some indictable crime. The provisions of s. 33 are not restricted to misdemeanours, nor are felonies excluded from their operation. The difficulty arising from punishment also no longer exists, because s. 5 of the Offences against the Person Act, 1861, provides that manslaughter, which is a felony, can in the discretion of the Court be punished by a fine. It follows, therefore, that the judgment of the Court can be enforced against a corporation for the felony of manslaughter by means of a fine. The old difficulties as to procedure and punishment having disappeared, it follows that the dicta of the judges to the effect that a corporation cannot be indictable for a felony have ceased to have any application on the principle cessante ratione legis cessat ipsa lex. This argument is supported by Lord Blackburn's speech in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), where he said that there was no reason in principle why a corporation could not be tried and convicted for a criminal libel or for a nuisance. A corporation can only act through agents, but the acts of the corporation's agents are the acts of the corporation, for which the corporation is responsible. If the acts of the agents are such as would render the corporation liable to the criminal law if the corporation were an individual, the corporation will now, having regard to the provisions of s. 33 of the Act of 1925, be liable to the criminal

(1) (1880) 5 App. Cas. 857, 870.

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law. If the agents are authorized to commit acts which amount to crimes, as in the present case, the Legislature cannot have intended that the principal should escape punishment.

FINLAY J. The point that has been raised is one of great importance, and I am very much indebted to counsel for the able way in which they have argued it. But sitting here I think that I am bound by authority to decide in favour of the objection which Mr. Birkett has taken.

The indictment which is before me is an indictment charging three individuals and a limited company, called Cory Brothers & Co., Ld., with two offences. In the first count the three individuals and the company are charged with manslaughter, and in the second count the three individuals and the company are charged with setting up an engine calculated to destroy human life or inflict grievous bodily harm with intent that the same should or whereby the same might destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact with it. That count is based upon s. 31 of the Offences against the Person Act, 1861.

The way in which the matter comes before me is this. In the Criminal Justice Act, 1925, s. 33, sub-s. 1, provides as follows: "Where a corporation is charged, whether alone or jointly with some other person, with an indictable offence, the examining justices may, if they are of opinion that the evidence offered on the part of the prosecution is sufficient to put the accused corporation upon trial, make an order empowering the prosecutor to present to the grand jury at assizes or quarter sessions, as the case may be, a bill in respect of the offence named in the order, and for the purpose of any enactments referring to committal for trial (including this Act) any such order shall be deemed to be a committal for trial." That is followed by certain sub-sections carrying out that provision. In particular I may notice sub-s. 3, which enables a corporation, if a true bill against the corporation is returned by the grand jury, to "enter in writing by its representative a plea of

guilty or not guilty, and if either the corporation does not appear by a representative or, though it does so appear, fails to enter as aforesaid any plea, the Court shall order a plea of not guilty to be entered and the trial shall proceed as though the corporation had duly entered a plea of not guilty." Now with regard to the first matter which arises I entertain no doubt at all that that section is merely machinery directed to avoid an inconvenience which had been a great deal felt by reason of the fact that a corporation could not be indicted at assizes, and therefore it was necessary to remove an indictment against a corporation by certiorari into the King's Bench. I am confirmed in the view that this is mere machinery by the fact that Mr. Artemus Jones in his argument admitted that this section did not alter the substantive law, but merely provided machinery for carrying out the purpose of the law whereby already a corporation could be charged with certain offences.

That being so, it is only necessary to ascertain the criminal offences with which a corporation could at the date of the Act—and therefore now—be charged. In Archbold's Criminal Pleading, 27th ed., p. 9, the law is summarized in this way: "By s. 2, sub-s. 1, of the Interpretation Act, 1889, 'in the construction of every enactment relating to an offence punishable on indictment or summary conviction, whether contained in an Act passed before or after' January 1, 1890, 'the expression "person" shall, unless a contrary intention appears, include a body corporate.'. . . . A contrary intention would be inferred in the case of treason, felony, or misdemeanours involving personal violence"; and for that proposition the case of *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) is cited.

It is only necessary, I think, that I should look at the authorities in order to ascertain whether that statement of the law is justified, because if it is justified then I think it is clear that this indictment does not lie against the company. As regards the charge of manslaughter it is, of course, not necessary to say that it is a felony. As regards the second

(1) 5 App. Cas. 857.

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count, involving exactly the same facts as the first count, I entertain no doubt at all that that is a misdemeanour involving personal violence.

I do not think that sitting here it is necessary, or would be useful, that I should attempt to review the law, but I may observe that there are two cases in which the matter is put very clearly. The first case is *Reg.* v. *Great North of England Ry. Co.* (1), and the second case is *Reg.* v. *Birmingham and Gloucester Ry. Co.* (2) I take as a convenient statement of the law a passage in the judgment of Lord Denman C.J. in the first of those two cases where the Lord Chief Justice said this (3): "Some dicta occur in old cases: 'A corporation cannot be guilty of treason or of felony.' It might be added," Lord Denman goes on, "'of perjury, or offences against the person.' The Court of Common Pleas lately held that a corporation might be sued in trespass; but nobody has sought to fix them with acts of immorality. These plainly derived their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases: but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large." In the other case, *Reg.* v. *Birmingham and Gloucester Ry. Co.* (2), the particular passage which I think useful is to be found in the judgment of Patteson J., delivering the judgment of the Court, where that learned judge, after citing a passage from a decision of Lord Holt, which is to this effect: "Note, per Holt C.J. A corporation is not indictable, but the particular members of it are," proceeds to say (4): "What the nature of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony,

(1) 9 Q. B. 315.
(2) 3 Q. B. 223.
(3) 9 Q. B. 326.
(4) 3 Q. B. 232.

or for crimes involving personal violence, as for riots or assaults." Then there is a third case, *Reg.* v. *Tyler* (1), where in the judgment of Bowen L.J. there is this passage (2): "It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment. That was laid down in *Reg.* v. *Birmingham and Gloucester Ry. Co.* (3), where Patteson J., in delivering the judgment of the Court, said that 'as a general proposition . . . . a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults.'" Passages much to the same effect are to be found in the judgments of the House of Lords in *Pharmaceutical Society* v. *London and Provincial Supply Association* (4), the case to which my attention was called by Mr. Artemus Jones and which is cited in Archbold.

Now in that state of the authorities I conceive that the less I say about this matter the better. If it is conceded, as I think it must be conceded, that the substantive law is not altered by the Act of 1925, then we have simply to ascertain from the authorities what the law is. It is always a tempting argument to say that the common law ought to keep pace with modern developments, and therefore it ought to be decided that these authorities are antiquated and that in 1927 they do not apply. Well, all I can say to that argument is this: it may be that the law ought to be altered; on the other hand it may be that these authorities ought still to govern the law, but it is enough for me to say, sitting here, that in my opinion I am bound by authorities, which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony or for a misdemeanour of the nature set out in the second count of

(1) [1891] 2 Q. B. 588.
(2) Ibid. 592.
(3) 3 Q. B. 223.
(4) 5 App. Cas. 857.

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this indictment, which is based upon s. 31 of the Offences against the Person Act, 1861.

For these reasons, basing myself, as I think it my duty to do, upon authority, and deciding the matter, in spite of the most attractive argument of Mr. Artemus Jones, in accordance with that view, I must decide that Mr. Birkett's objection is a good one and that the company cannot be indicted for these offences.

Indictment against the company quashed.

Solicitors for company: *Kensholes & Prosser, Aberdare.*
Solicitors for Crown: *Morgan, Bruce & Nicholas, Pontypridd.*

R. F. S.

Dictum of SALTER, J., at p. 824, *approved.* FORD *v.* LANGFORD. [1949] 1 All E.R. 483.

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Nov. 18, 19.

BRACEY *v.* PALES.

Landlord and Tenant—Rent Restriction—Dwelling-house—Occupation rent free—Action for Possession—Right of Tenant to statutory Protection—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 7.

The Rent and Mortgage Interest Restrictions Acts, 1920 and 1923, do not protect the rent free tenant of a dwelling-house against an order for the recovery of possession thereof.

Hornsby v. *Maynard* [1925] 1 K. B. 514 applied.

APPEAL from Barnet County Court.

Mr. F. Bracey was the sole surviving partner in a firm of builders known as Bracey & Clark, and he had long continued to carry on the business in the name of the firm at Boreham Wood, Herts, and elsewhere in the neighbourhood. He was also the owner of several cottages at Boreham Wood which had been built by the firm. For a good many years before 1914 Mr. W. H. Pales, a painter and decorator, had been in the employment of Mr. Bracey, and had occupied one of the said cottages called The Homestead, the annual value of which was within the limit fixed by the Rent Acts, and during that period Pales had paid rent for that cottage.

Adjoining that cottage there was a builder's yard belonging to Mr. Bracey, on which there was a signboard bearing his name. In 1916 Pales went abroad on military service and was absent for about three years. During his absence his wife died, his children ceased to live in that cottage, his tenancy of it was determined, and it was let to another tenant, a Mrs. Harding.

In March, 1919, Pales returned from military service and re-entered the service of Mr. Bracey, being employed for a time at a payment by the hour, but later at a payment by the week. On resuming the service he went into occupation of another of the above mentioned cottages called Oakleigh, but after a short time The Homestead became vacant and thereupon he again occupied that cottage. In April, 1925, Mr. Bracey died, and his widow, Mrs. E. Bracey, was the executrix and sole beneficiary under his will. On September 6, 1925, Mrs. Bracey wrote to Pales informing him that she was ceasing to carry on the business and that his employment would terminate on September 12, 1925. After the termination of his employment on the latter date Pales, however, still continued to occupy the cottage, and on a threat of proceedings to eject him he wrote a letter stating that it had been Mr. Bracey's wish that he should carry on business at the yard adjoining his cottage.

On February 22, 1926, Mrs. Bracey brought the present action against Pales claiming possession of The Homestead on the ground that the defendant occupied the property free of rent by virtue of his employment as a servant of the plaintiff and her predecessors and that, his employment having terminated, she was entitled to possession of the property; and she further claimed a sum for use and occupation of the cottage from September 12, 1925, to April 20, 1926. The defendant in his defence stated (para. 1) that for many years before his employment with the plaintiff terminated he was a weekly tenant of the plaintiff's predecessor of the said cottage at a weekly rent of 13*s.* 7*d.*, the standard rent being 9*s.* 6*d.*, and that no notice to determine that tenancy or to increase the standard rent was given to

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him; (para. 2) that after his employment terminated he became tenant to the plaintiff at the rent aforesaid and paid the same to the plaintiff's agent until the plaintiff refused to accept further payments, and that no notice to determine the tenancy or to increase the standard rent had been given to him.

On May 11, 1926, the action was tried in the county court.

On behalf of the plaintiff evidence was given by the manager of the business, by the clerk in charge of the wages book, and by the plaintiff herself. These witnesses stated among other things that from the time when the defendant re-entered the service of Mr. Bracey in 1919 he paid no rent for The Homestead, that he was paid a fixed weekly wage under his contract of service, and that no deduction from the amount of the weekly wage due to him under his contract of service was ever made for rent.

The defendant stated in evidence that from the time when he re-entered Mr. Bracey's service he paid rent every week first for Oakleigh and then for The Homestead; that the rent was paid for a short time to a rent collector named Fudge, and afterwards to Mr. Bracey directly, who obtained it by making a deduction of the amount from the defendant's weekly wage; that the amount which he received each week was less than the wage which he earned each week at first by 9*s.* and later by 13*s.* 7*d.*, the deduction being made in respect of the rent of the cottage; that on September 14, 1925, he was called upon by Fudge, who knew that his employment had ended, that he told Fudge that he had to pay rent, and that Fudge gave him a rent-book. Mr. Fudge, who was employed to collect the rents of the houses belonging to Mr. Bracey, said that, when the defendant's employment ceased, he (witness) thought it would be proper to demand rent from the defendant for the cottage in which he resided; that thereupon he accordingly demanded and received rent from the defendant for three weeks, and gave him a rent-book; and that he was then told that he had done wrong in accepting rent from the defendant, and that he should repay the amount to the defendant, as he accordingly did.

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The county court judge found that since the defendant's return from military service no tenancy ever existed between Mr. Bracey or the plaintiff and the defendant, that the defendant was paid a fixed weekly wage without any deduction for rent, that Mr. Bracey and afterwards the plaintiff had allowed the defendant to remain in occupation of the cottage rent free at their pleasure as a servant, and that the defendant was not a tenant.

M. Hilbery for the defendant, appellant. The county court judge was wrong in finding that since the defendant's return from the war in 1919 no tenancy ever existed between Mr. Bracey or the plaintiff and the defendant, and that they merely allowed him to remain in occupation of the cottage rent free at their pleasure as a servant; and in holding that the defendant was therefore not a tenant entitled to the protection of the Rent Restriction Acts. The evidence went to show that since 1919 the defendant was the tenant of the cottage from the Braceys at a rent which he paid either directly or by deduction from his wages. Even if the defendant was allowed to occupy the cottage rent free, his occupation of it was not that of a servant, but of a tenant, entitling him to be regarded as an occupier for the purpose of the franchise: *Hughes* v. *Chatham Overseers* (1); *Smith* v. *Seghill Overseers* (2); *Marsh* v. *Estcourt* (3); *Dover* v. *Prosser*. (4) A person who lives in the house of another rent free is a tenant at will: Woodfall's Landlord and Tenant, 20th ed., p. 276, and a tenant at will is a tenant. The cottage in question is a house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, and, if the defendant was a tenant of it, then by s. 5, sub-s. 1, of that Act, re-enacted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, no order or judgment for the recovery of possession of it could be made or given against him unless he has been deprived of that protection by some other provision of the Act. He has not been deprived of that protection by any other provision. He is not deprived

(1) (1843) 5 Man. & G. 54.
(2) (1875) L. R. 10 Q. B. 422.
(3) (1889) 24 Q. B. D. 147.
(4) [1904] 1 K. B. 84.

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of it by s. 12, sub-s. 7, of the Act, which provides that where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value the Act shall not apply to that rent or tenancy, and that the Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed. The meaning and effect of that sub-section are explained in *Mackworth* v. *Hellard*. (1) Here the evidence showed that the defendant paid a rent for the cottage which was not less than two-thirds of the rateable value. If the defendant's tenancy was rent free, then no doubt by that sub-section the Act would apply as if no such tenancy existed, but still by that sub-section the Act would apply in respect of the cottage in other respects, and therefore by s. 5 it would apply to protect the defendant's possession of it.

Hallett for the plaintiff, respondent. The findings of the county court judge were supported by the evidence and his decision was right. The question is whether the plaintiff is a tenant within the meaning of the Rent Restriction Acts, so as to be entitled to the protection of these Acts. First, the defendant was not a tenant within the meaning of the Acts inasmuch as he was not a tenant at all, but a servant. The county court judge found that the defendant was allowed by his employers to remain in occupation of the cottage as a servant, and there was evidence to support that finding; and the judge therefore rightly held that the defendant was not a tenant. A servant employed to take care of premises and allowed to occupy them is not a tenant: *National Steam Car Co.* v. *Barham* (2) and *Ecclesiastical Commissioners* v. *Hilder*. (3) In Scotland it has been held that a servant who occupied a house belonging to his employers in virtue of his employment and as part of his wages was not a tenant, the employment in one case being that of a gamekeeper: *Marquis of Bute* v. *Prenderleith* (4), and in another that of a teacher: *Pollock* v. *Assessor for Invernessshire*. (5)

(1) [1921] 2 K. B. 755.
(2) (1919) 122 L. T. 315.
(3) [1920] W. N. 268.
(4) 1921 S. C. 281.
(5) 1923 S. C. 693.

In *Dobson* v. *Richards* (1) and *Remon* v. *City of London Real Property Co.* (2) it was no doubt held that after an agreement of tenancy had been determined the occupier was still a tenant, but in the latter of these cases Scrutton L.J. pointed out that the principle of these decisions did not extend to caretakers and occupants by service. The franchise and rating cases relied upon on behalf of the defendant have no application to the present case, because in these cases the question was whether the person in occupation of the house occupied it in his own right or in right of his employer, whereas here the question is whether the defendant occupied the house as a tenant or as a servant.

Secondly, even if the defendant was a tenant at common law, he was not a tenant within the meaning of the Rent Restriction Acts, because, as the county court judge has found, he occupied the cottage rent free. These Acts on their true construction do not apply to the case of a tenant who occupies rent free. The general purpose of the Acts, as stated in the title of the earliest of them, namely the now repealed Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), is to restrict the increase of the rent of small dwelling-houses. A person cannot be said to pay "rent" within the meaning of the Acts, who pays no rent. There is no section of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which contemplates the case of a tenant who pays no rent. In *Hornsby* v. *Maynard* (3) it was decided that the term "rent" as used in the Act means rent in money only. In particular s. 12, sub-s. 7, provides that where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value, the Act shall not apply to that rent or tenancy, and it is therefore clear that when the tenancy is rent free the Act does not apply to it. That sub-section further provides that the Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed, and the effect of that provision is that,

(1) [1919] W. N. 166. (2) [1921] 1 K. B. 49, 58.
(3) [1925] 1 K. B. 514.

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although the Act still applies to the house itself, the tenancy is taken entirely outside the Act: *Waller & Son* v. *Thomas* (1) and *Mackworth* v. *Hellard*. (2)

SALTER J. This action was brought by the plaintiff in the Barnet County Court to recover possession of a house of which she is the owner from the defendant who was in occupation of it. The question is whether the defendant is entitled to resist the plaintiff's claim by reason of the provisions of the Rent Restriction Acts. [His Lordship stated the facts at length, referred to the conflict of evidence as to whether the defendant had paid rent for The Homestead, and continued as follows:] On these facts the county court judge found that no tenancy ever existed between Mr. Bracey and the defendant or, after Mr. Bracey's death, between the plaintiff and the defendant since the defendant's return from the war in 1919. His finding is that from that time onwards Mr. Bracey and afterwards the plaintiff allowed the defendant to remain in occupation of the cottage rent free at their pleasure as a servant, and that he was not a tenant.

The first matter that has arisen on this appeal is whether there was evidence on which the county court judge could find that since 1919 no relation of tenancy ever existed between Mr. Bracey or the plaintiff and the defendant. If it were necessary to determine whether at common law the defendant was ever a tenant of Mr. Bracey or the plaintiff, I think a question might arise which would present some difficulty, or which at least I should desire to take time to consider in the light of the authorities. Cases have been cited in which the question was whether servants occupying houses belonging to their employers were entitled to be regarded as occupiers for the purpose of the franchise, and in which it was held that they were entitled to be so regarded, the real question in these cases being whether they occupied in right of their employers as their servants, or in their own right as tenants. On the other hand two Scottish cases have been referred

(1) [1921] 1 K. B. 541. (2) [1921] 2 K. B. 755.

to in which it was laid down that a servant who by virtue of his employment and as part of his remuneration occupies a house belonging to his employers does so under his contract of service and not under a contract of tenancy, and that the Rent Restriction Acts do not apply to his occupation.

In my opinion it is not here necessary to decide this question, because, even if the defendant was a tenant of Mr. Bracey or the plaintiff at common law, he was not a tenant under the Rent Restriction Acts so as to be entitled to the protection of those Acts. If he was a tenant at all, he was a rent free tenant, and the Acts do not protect a tenant who holds rent free. That view is supported by a consideration of the general structure of the Acts, and also by the case of *Hornsby* v. *Maynard* (1), in which it was held that the term "rent" as used in the Acts means pecuniary rent only. It is supported more particularly by s. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Sect. 12 is a definition section, and sub-s. 7 of that section provides: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." Applying that provision to the present case, I think that the house in question is a house to which the Act applies, but that the case must be regarded as if the defendant's tenancy of the house did not exist and never had existed. If that be so, it follows that the defendant cannot be regarded as a tenant of the house so far as the Act is concerned, and the case is removed from the restriction imposed on the landlord's right to possession by s. 5, sub-s. 1, of the Act of 1920, re-enacted by s. 4, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, which provides that no order or judgment for the recovery of possession of any dwelling-house to which the Act applies shall be made or given unless as in that section mentioned. The result is that the defendant is not

(1) [1925] 1 K. B. 514.

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in a position to invoke the protection of the Acts against an order for possession of the house.

I therefore think that the judgment of the county court judge directing the defendant to give up possession of the house to the plaintiff is right, and that this appeal should be dismissed.

MACKINNON J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Watkins, Pulleyn & Ellison, for F. Cookesley Slater, Boreham Wood.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Sedgwick, Turner, Sworder & Wilson, Watford.*

J. R.

Followed. RAMA CORPN., LTD. *v.* PROVED TIN & GENERAL INVESTMENTS, LTD. [1952] 1 All E.R. 554.

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Jan. 18, 19.

[IN THE COURT OF APPEAL.]

KREDITBANK CASSEL G.M.B.H. *v.* SCHENKERS, LIMITED.

[1925. K. 219.]

Followed. RAMA CORPN. *v.* PROVED TIN, ETC. [1952] 1 Q.B. 147

Followed. RAMA CORP. *v.* PROVED TIN, ETC. [1952] 2 Q.B. 147

Company—Liability on Bills of Exchange—Bills wrongfully drawn on Behalf of Company by Branch Manager—Forgery—Ostensible Authority—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 24—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 77.

The defendant company, by its memorandum, had power to sign, draw, accept and indorse bills of exchange, and by its articles of association the directors were empowered "to determine who shall be entitled to sign and make, draw, accept and indorse on the company's behalf bills . . . . acceptances, indorsements. . . . ." The defendants, whose business was that of forwarding agents, had a branch at Manchester under a branch manager S. C., who, without having received any authority from the defendants, and acting in fraud of them, drew seven bills purporting to do so on the company's behalf, "S. C. Manchester Manager." The bills were drawn to the order of the company, accepted by C. & W. Ld., a company in which S. C. was interested, and indorsed on behalf of the defendants "S. C. Manchester Manager." The bills having been dishonoured by the acceptors, the plaintiffs, who were holders in due course, sued the defendants as drawers:—

Held, (1.) applying *Houghton & Co.* v. *Nothard, Lowe & Wills*, ante, p. 246, that as it did not appear that the plaintiffs knew of the

existence of the power of delegation contained in the defendants' articles of association they were not entitled to rely upon its supposed exercise; (2.) that the bills of exchange were forgeries and therefore, applying *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, that the plaintiffs could not in any event invoke the principle that they were not bound to inquire into the indoor management of the defendant company; (3.) that even if the plaintiffs had known of the power of delegation they were not entitled to assume that a person in the position of a provincial manager like S. C. had ostensible authority to draw and indorse bills on behalf of the defendants; (4.) that the defendants had done nothing to preclude themselves from setting up the forgery of the bills or the want of authority of S. C.; and therefore (5.) that the defendants were not liable on the bills.

Decision of Wright J. reversed.

APPEAL from a decision of Wright J., reported [1926] 2 K. B. 450.

The plaintiffs, a German bank, sued the defendants as drawers and indorsers of seven bills of exchange which had been dishonoured by the acceptors.

The defendants were a limited company carrying on business as general carriers in London, with an office at Manchester, of which one S. Clarke was branch manager. By their memorandum of association the defendants had power to draw, accept, and indorse bills of exchange, and article 18 of their articles of association empowered the directors "to determine who shall be entitled to sign and make, draw, accept, and indorse on the company's behalf bills, notes .... acceptances, indorsements, cheques, releases, contracts, and documents." By a resolution of the directors the company's bank was empowered to honour on behalf of the company cheques, bills, and promissory notes drawn, signed, accepted or made by the manager, assistant manager or by any one director, and by a further resolution the bank was empowered to honour the signature of S. Clarke on all cheques payable only to His Majesty's Customs. Clarke also indorsed cheques made payable to the defendants and paid them into the defendants' bank. No other authority was delegated to him by the directors, but he had, with the directors' consent, and used, a rubber stamp with which he could sign on behalf of the defendants as Manchester manager.

In August, 1924, Clarke became concerned in the formation

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of a company called Clarke & Walker, Ld., and in September of that year he went to Germany, and on that company's behalf bought from one Teichmann a large quantity of toys, arranging to pay by bills drawn in the name of the defendants upon Clarke & Walker, Ld., but in fact he had no authority to do this from the defendants, and they had no knowledge of the arrangement, which was a fraud upon them. Seven bills, for a total sum of 1400*l.*, were in fact drawn in this way on behalf of Schenkers, Ld., "S. Clarke, Manchester Manager," to drawers' order, accepted by Clarke & Walker, Ld., indorsed on behalf of Schenkers, Ld., "S. Clarke, Manchester Manager," and sent by Clarke to Teichmann in a letter dated Manchester, September 16, 1924, in the following terms: "We beg to enclose you herewith bills of exchange for 1400*l.* ex Messrs. Clarke & Walker and countersigned by our good selves. Kindly acknowledge receipt of same and oblige." This letter was signed "For and on behalf of Schenkers, Ld., S. Clarke, Manchester Manager." Teichmann took the bills to the plaintiff bank who, not having obtained satisfactory reports as to Clarke & Walker, Ld., refused at first to discount more than three of them without further security, but agreed to discount the remaining four if they had the further security of the indorsement of the German firm of Schenker & Co., whose head office was in Berlin and who had various branches in Germany, including one at Sonneberg, of which a man named Bauer was manager. Bauer, as such manager, indorsed the bills and the plaintiffs discounted them.

The bills having been dishonoured by the acceptors, the defendants were called upon to take them up, but they repudiated the whole transaction, and stated that Clarke had acted without authority.

It appeared that the defendants never signed bills, and there was no evidence that the plaintiffs knew of the existence in the defendants' articles of association of the power to delegate authority to draw or indorse bills.

Wright J. held that Clarke in drawing the bills on behalf of the defendants was a person acting under their authority

within the meaning of s. 77 of the Companies (Consolidation) Act, 1908, and that the defendants were liable inasmuch as by their constitution the Manchester manager might have been authorized to draw the bills, and therefore a person taking them in due course was not prejudiced because Clarke had no authority in fact.

The defendants appealed.

Pritt for the defendants. In *Royal British Bank* v. *Turquand* (1) it was decided that a person dealing with a limited company who knows that the company has power to do certain things, and that the directors may determine who shall do these things on behalf of the company, is entitled to assume that if one of these things is purported to be done on behalf of the company, it has been legitimately done; but that rule has no application where, as in this case, the plaintiffs have had no dealings with the defendant company, except what may be called a law merchant dealing, and where the person purporting to bind the defendants is not one of the class who would normally be entrusted with authority to sign and indorse bills on their behalf. In no case has the rule been applied against a company except for acts done by a director. In such a case the person dealing with the company is justified in assuming that a director has been clothed with authority to do the particular act. But the position of the manager of a provincial branch bears no analogy to that of a director. *Houghton & Co.* v. *Nothard, Lowe & Wills* (2) shows that a person who has no knowledge of the existence of the power of delegation in a company's articles of association—and in this case it was not shown that the plaintiffs had such knowledge—he cannot rely upon it so as to validate an unauthorized transaction.

[ATKIN L.J. May it not be said to have been within the implied authority of Clarke to draw and indorse bills?]

That is a matter of evidence, and at the trial there was none directed to the point.

(1) (1855–56) 5 E. & B. 248; 6 E. & B. 327. (2) Ante, pp. 246, 266.

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Further, the bills were forgeries, and unless the defendants have precluded themselves from setting up the forgery or want of authority on the part of Clarke, the plaintiffs can acquire no title through them. Nothing has been done by the defendants to preclude themselves from setting up the forgery or want of authority, and they are therefore not liable.

[He was stopped.]

Miller K.C. and *Somervell* for the plaintiffs. *Houghton & Co.* v. *Nothard, Lowe & Wills* (1), which was concerned with an ordinary contract, does not govern this case. Here we are dealing with negotiable instruments drawn and signed by a manager of the defendants.

[SCRUTTON L.J. He was the manager of the Manchester branch.]

That indicates merely a geographical limitation, and not a limitation of Clarke's authority. He was, moreover, an assistant manager; it was shown that by a resolution of the directors he was empowered to sign cheques, though for a limited purpose, and a general authority to indorse cheques in his area; he had authority to sign letters on behalf of the company, and one of these was sent with the bills in question signed by him "S. Clarke, Manchester Manager." In those circumstances, bearing in mind the terms of the defendants' memorandum and articles of association, are the plaintiffs, who took the bills without notice of any irregularity, and relying upon the ostensible authority of Clarke, to be defeated by the defendants showing that Clarke had in fact no authority? It is submitted that they are not. In *Houghton & Co.* v. *Nothard, Lowe & Wills* (1) Dart, who was negotiating the business for the plaintiffs, did not, in the opinion of the Court, rely upon the ostensible authority of Lowe, and the circumstances were such as to put him upon inquiry. The observations of Sargant L.J. in that case, which are relied upon by the defendants, must be taken to be limited to the facts with which he was dealing; this is made clear by his words "in a case like this." If his observations are meant

(1) Ante, p. 246.

to be of general application they go much beyond what was said in any of the earlier cases.

As to the contention that the bills were forgeries, it is submitted that if they are the defendants are precluded from relying on this or of the want of authority of Clarke: s. 24 of the Bills of Exchange Act, 1882. The signature on the bills of Clarke as Manchester manager with a letter on the defendants' letterpaper bearing the same signature justified the plaintiffs on seeing these in assuming that Clarke had authority.

[SCRUTTON L.J. In *Ruben* v. *Great Fingall Consolidated* (1), Lord Loreburn L.C., using practically the same language as that used by Stirling L.J. when that case was before the Court of Appeal (2), said that the doctrine that a person dealing with a limited company is not bound to inquire into its indoor management and is not affected by irregularities of which he has no notice has no application in the case of a forgery.]

What Lord Loreburn had in mind was the affixing of a signature by a total stranger. Where a document is signed by a person, and the signature purports to be by him, although it may be a forgery within the Forgery Act, 1913, it is nevertheless an instrument to which the rule in *Royal British Bank* v. *Turquand* (3) and *Mahony* v. *East Holyford Mining Co.* (4) can apply.

[They also referred to *In re County Life Assurance Co.* (5)]

BANKES L.J. In this case, which undoubtedly raises important points and one which was not raised before Wright J., the main facts are not really in dispute. The plaintiffs sue the defendants, alleging that the latter were the drawers and indorsers of certain bills of exchange which were dishonoured by the acceptors on presentation. The plaintiffs took proceedings under Order XIV., and in answer

(1) [1906] A. C. 439, 443.
(2) [1904] 2 K. B. 712, 729.
(3) 5 E. & B. 248; 6 E. & B. 327.
(4) (1875) L. R. 7 H. L. 869.
(5) (1870) L. R. 5 Ch. 288.

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to the claim the defendants by their affidavit said that the bills in question were drawn and indorsed by a man who was merely their branch manager in Manchester, and that he drew and indorsed them without authority. Although they did not say so in terms, in substance the defendants' case was that what this man did was done in fraud of them. Upon that affidavit, an order was made for the case to be tried as a short cause, and it was so tried before Wright J. The plaintiffs' case was that the defendants, a limited company, had in their articles of association an article which authorized the delegation of authority to do such an act as drawing or indorsing bills of exchange, and that, in view of that, the rule of law laid down by the House of Lords in *Mahony* v. *East Holyford Mining Co.* (1) applied, because the plaintiffs had discounted the bills bona fide and without notice of any irregularity attaching to them. Upon that state of facts and upon that contention Wright J. decided the case. At that time *Houghton & Co.* v. *Nothard, Lowe & Wills* (2) in this Court had not been decided. Mr. Pritt for the defendants relies upon that case as an authority that on the facts and the particular form of the article in this case the plaintiffs fail in substantiating their cause of action. But during the argument another point was taken—namely, that the act of the branch manager was a forgery, and there being nothing to estop the defendants from setting up the forgery the rule in *Mahony* v. *East Holyford Mining Co.* (1) does not apply. That is the argument on the one side and the other.

It is well established that in the case of a company incorporated under the Companies Acts which has an article empowering the directors to delegate their authority, any one dealing with the company is presumed to have notice of the existence of that article. It is also clearly established that a stranger dealing with the company has a right to assume as against the company that all matters of internal management have been duly complied with. There are many cases where, there being an article authorizing the

(1) (1875) L. R. 7 H. L. 869. (2) Ante, p. 246.

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delegation of authority, a company has been held liable although the person who has purported to act upon the delegation of authority had in fact no authority, because, whether he had it or not is a matter of internal management with which the stranger dealing with the company has no concern. In this case article 18 of the defendants' articles of association was in these terms: "The directors shall have power to determine who shall be entitled to sign and make, draw, accept and indorse on the company's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts and documents." That article is in a somewhat different form from that found in many of the decided cases, in which the article has itself usually indicated the person by name or by description to whom the power may be delegated. This is an article authorizing the directors to determine who shall be entitled to sign and, of course, they can, if they like, give authority to the most irresponsible person. In *Houghton & Co.* v. *Nothard, Lowe & Wills* (1) the article empowered the directors to "delegate to any managing director, local board, head manager, manager, attorney or agent any of the powers . . . . for the time being vested in the directors." The authority there was thus more circumscribed than here, because it indicated by description the persons to whom the authority might be delegated. In that case all the members of the Court came to the conclusion that the plaintiffs were not in a position to rely upon the rule in *Mahony* v. *East Holyford Mining Co.* (2), because upon the facts the true inference was that they did not rely upon any suggested delegated authority. The true inference from the facts there was that the plaintiffs distrusted the position of the person who was negotiating on behalf of the company, and, distrusting his authority, they required express confirmation of it, and, unfortunately for them, the express confirmation was no confirmation at all. But Sargant L.J., in whose judgment Atkin L.J. concurred, went further and laid down in terms a proposition of law that, in the circumstances of that case, which I cannot

(1) Ante, p. 246. (2) L. R. 7 H. L. 869.

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distinguish from those now before us, the rule in *Mahony* v. *East Holyford Mining Co.* (1) does not apply. If I am correct in that view, that is sufficient to dispose of this appeal.

But during the argument a further point was made which also seems to me fatal to the plaintiffs' case, the point, namely, that the act of the branch manager was a forgery so that the bills of exchange were mere waste paper, and the plaintiffs can therefore make no claim against the defendants except upon one of two grounds, either that the defendants are estopped from setting up the forgery, or that, apart altogether from the rule in *Mahony* v. *East Holyford Mining Co.* (1) and the form of article 18, the branch manager had such ostensible authority as to render his employers, the defendants, liable for his act in drawing and indorsing the bills.

Counsel for the plaintiffs have contended that the observations of Lord Loreburn in *Ruben* v. *Great Fingall Consolidated* (2), which are relied upon for the defendants, have no application to the facts of this case. It is material, however, to see what Stirling L.J. said in that case upon the point when it was before the Court of Appeal. (3) There, dealing with the question whether the fact that the document is a forgery is of any importance when you are seeking to apply the rule in *Mahony* v. *East Holyford Mining Co.* (1), Stirling L.J., after referring to the articles of association, said (4): "The document on which the plaintiffs rely is written on the company's paper, and has the seal of the company affixed, and is countersigned by the secretary; it also purports to bear the signatures of two directors, but these are mere forgeries by the secretary. In the circumstances the certificate (as was indeed admitted by the plaintiffs at the trial) is not a valid or genuine document, and does not in my opinion bind the defendants. It was suggested that, inasmuch as the document appeared on the face of it to satisfy the requirements of the articles of association, the plaintiffs, acting as they did in good faith,

(1) L. R. 7 H. L. 869.
(2) [1906] A. C. 439.
(3) [1904] 2 K. B. 712.
(4) [1904] 2 K. B. 729.

were not affected by irregularities in the proceedings of the secretary: *Mahony* v. *East Holyford Mining Co.* (1) To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void. The distinction is drawn by Lord Hatherley in advising the House of Lords in the case itself." That being the decision appealed from, Lord Loreburn L.C., when *Ruben's* case (2) was before the House of Lords, said this (3): "I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery." It is quite true, as Mr. Miller pointed out, that that statement had reference to a certificate and not to a bill of exchange, and he relied on s. 24 of the Bills of Exchange Act, 1882, which he contended distinguishes this case and protects his clients. In my opinion, short of an estoppel, that section does not assist the plaintiffs. Although the rule in reference to forgery is as stated by Lord Loreburn, the person seeking to set up the forgery may be estopped from doing so. Lord Macnaghten deals with that point in *Ruben's* case (2) where, in reference to the fact that the document in question was a forgery, he said (4): "Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel." In my opinion there was no evidence in this case upon which an estoppel could be founded. It seems to me to have been proved that the bills are forgeries, and there being no evidence of estoppel, the plaintiffs cannot rely upon the rule laid down

(1) L. R. 7 H. L. 869.
(2) [1906] A. C. 439.
(3) [1906] A. C. 443.
(4) Ibid. 444.

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in *Mahony* v. *East Holyford Mining Co.* (1) They are then driven to rely, if they can, upon the ordinary rule applicable in the case of principal and agent. If they could have shown that the drawing and indorsing of bills of exchange was within the ostensible authority of a person occupying the position which this branch manager occupied, they might have been in a position to establish a claim founded upon that ground. No such evidence was given, and I certainly am not prepared to accept the proposition that it was within the ostensible authority of this branch manager, having regard to his position, to sign bills to this amount and in this form.

Mr. Miller, for the plaintiffs, relied upon the letter that was sent by the branch manager accompanying the bills, but so far from assisting Mr. Miller's case it seems to me to be against it. It certainly does not amount to an estoppel that the branch manager was allowed to use letterpaper headed "Schenkers, Ld., International Forwarding Shipping and Insurance Agents. Head Office, 15 Eldon Street, London," and it is certainly not an estoppel that he was allowed to use a stamp for signing documents for and on behalf of Schenkers, Ld., "Manchester manager." The letter does not carry the matter further than the bills themselves.

In my opinion the appeal succeeds upon both grounds, and judgment must be entered for the defendants.

SCRUTTON L.J. This is not an easy case, and, but for two decisions to which we have been referred, I should have desired to go much more carefully into the various lines of authorities than has been done; but in my view this Court is bound by authority to decide that this appeal should be allowed.

The facts are somewhat curious. One Teichmann in Germany sold a considerable quantity of goods—over 1000*l.* worth—to Clarke & Walker, Ld., of Manchester. As is usual in commercial transactions, while the buyer desired

(1) L. R. 7 H. L. 869.

credit and was only prepared to pay by bills, the seller desired to get his money as soon as possible by discounting the bills given to him. The ordinary course in such circumstances would be for the seller to draw on the buyer and get the bills discounted before or after acceptance. That, however, was not the course followed. Clarke, representing the supposed buyers, Clarke & Walker, Ld., came to the seller with bills drawn by Schenkers, Ld., signed on their behalf by himself, described as Manchester manager, and already accepted by Clarke & Walker, Ld. The position, therefore, was that Clarke & Walker, Ld., were primarily liable, but for some reason Schenkers, Ld., had by drawing become liable and guaranteed payment by Clarke & Walker; and the person who signed the bills which would make Schenkers, Ld., guarantors, was Clarke, of Clarke & Walker, Ld., describing himself, not as director or managing director, but as Manchester manager. The bills were accompanied by a letter from Manchester addressed to the seller in these terms: "We beg to enclose you herewith bills of exchange for 1400*l.*, ex Messrs. Clarke & Walker, and countersigned by our good selves." That letter, which was signed "For and on behalf of Schenkers, Ld., S. Clarke, Manchester Manager," adds nothing to the signature appearing on the bills of exchange, "Schenkers, Ld., S. Clarke, Manchester Manager." As a matter of fact, Clarke had no authority to bind Schenkers, Ld. Article 18 of that company's articles of association empowered the directors to delegate to any one the power of signing bills of exchange, but in fact they had not delegated to Clarke, who had no authority to bind them, and he knew it. In purporting to bind them he was defrauding them. Teichmann, the seller, took the bills to the plaintiff bank, who discounted them, and then, after Schenkers, Ld., had disclaimed them, this action was brought and came before Wright J., who applied the doctrine of *Royal British Bank* v. *Turquand*. (1) As I understand that doctrine it is this: any person dealing with a company is deemed to have notice of its articles of association—some

(1) 5 E. & B. 248; 6 E. & B. 327.

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of the cases go further and say that he must be deemed to understand them, an extensive presumption sometimes—but if, looking at the articles, or being deemed to know their contents, the thing that has been done is one that might have been done, if certain internal arrangements had been made, the person so dealing with the company is not bound to inquire whether those internal arrangements have been carried out, but is entitled to assume regularity in the proceedings. Acting on that decision Wright J. found that as there was in the articles of Schenkers, Ld., an article under which power could have been delegated to Clarke, the Manchester manager, the bank was not bound to inquire whether power had in fact been delegated to him and consequently, on *Turquand's* case (1) and the line of authorities following it, the judge held that the bank was excused from inquiring whether the domestic arrangements necessary to delegate to Clarke the power to draw bills of exchange had been complied with.

There are two matters which, I think, bind me to say that Wright J.'s decision is wrong. First, it has been established by the House of Lords that the doctrine that you are deemed to have notice of a company's articles of association and need not inquire whether the domestic arrangements necessary to carry out the power of delegation there given have been made, has no application where the document to which that principle is sought to be applied is a forgery: *Ruben* v. *Great Fingall Consolidated.* (2) Any one who remembers when that case was decided will recall the great discussion to which it gave rise in legal and commercial circles. In that case the secretary of a company had issued a document purporting to be regularly signed by the directors, and with the seal of the company affixed, to people who advanced money on the strength of it. The secretary was a person who had authority to issue certificates; but the company was allowed to say to those persons who had advanced money on the faith of the certificate that the document was not binding on them. That, as Bankes L.J.

(1) 5 E. & B. 248; 6 E. & B. 327. (2) [1906] A. C. 439.

has said, is pointed out in the judgment of Stirling L.J., who, after citing the decision of the House of Lords in *Mahony* v. *East Holyford Mining Co.* (1), where the doctrine that every one is presumed to know the articles of association of a company is most clearly stated, said (2) : "To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void. The distinction is drawn by Lord Hatherley in advising the House of Lords in the case itself." When *Ruben's* case (3) came before the House of Lords (3), Lord Loreburn L.C., using almost the same language as that used by Stirling L.J., said (4) : "It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery." Lord Macnaghten, in the same case, without referring definitely to the doctrine, based his judgment in favour of the company upon the ground that the document was a forgery and was not the company's deed, and that there was nothing to prevent the company saying so. There is this difficulty about *Ruben's* case (3) that Lord Davey put as one of the grounds for the decision in favour of the company, that the fraudulent act giving rise to the action was done for the benefit of the secretary and not for the benefit of the company, thus applying a passage in the judgment of Willes J. in *Barwick* v. *English Joint Stock Bank* (5) ; but the House of Lords, in the subsequent case of *Lloyd* v. *Grace, Smith & Co.* (6), in the decision of which Lord Loreburn and Lord Macnaghten took part, said that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. There is a little difficulty in

(1) L. R. 7 H. L. 869.
(2) [1904] 2 K. B. 712, 729.
(3) [1906] A. C. 439.
(4) [1906] A. C. 443.
(5) (1867) L. R. 2 Ex. 259, 265.
(6) [1912] A. C. 716.

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reconciling *Ruben's* case (1) and *Lloyd* v. *Grace, Smith & Co.* (2) on this point. I have always felt that difficulty, more especially as I was the judge who tried *Lloyd* v. *Grace, Smith & Co.* (2), and having been reversed by the Court of Appeal, was affirmed by the House of Lords. But in view of the fact that *Ruben's* case (1) was cited in *Lloyd* v. *Grace, Smith & Co.* (2), and the House of Lords, while dissenting from Lord Davey's statement, said nothing to interfere with the judgment so far as it was based on the fact that the document in question was a forgery, I am bound by it. In the present case the bills are clearly forgeries within the Forgery Act, 1913, as they contain a false statement—namely, that Clarke was acting for the company, and they purport to bind the company in fraud of the company. That being so, I feel bound by the decision of the House of Lords to hold that it is not open to the present plaintiffs to say: "The question whether authority has been delegated to Clarke, the Manchester manager, is a matter of internal management about which we need not inquire under the rule in *Turquand's* case." (3)

The second matter which I think binds me is this. In *Houghton & Co.* v. *Nothard, Lowe & Wills* (4), which in many of its details is very similar to this, two judgments in effect were given in the Court of Appeal. Bankes L.J. dealt with the question on the particular facts and declined to express any further opinion, but Sargant L.J., in whose judgment Atkin L.J. concurred, took a further point. He there said that although there is a power of delegation contained in the articles of association, and although a person dealing with a company is deemed to know it, he cannot be heard to say: "I am deemed to have known of the power to delegate and I acted upon it," unless it is proved that he had knowledge of the existence of the power. I hope it is not disrespectful to express the wish that Sargant L.J., who is thoroughly conversant with this branch of law, had explained to those not equally familiar with it, how this fits in with

(1) [1906] A. C. 439.
(2) [1912] A. C. 716.
(3) 5 E. & B. 248; 6 E. & B. 327.
(4) Ante, p. 246.

the doctrine enunciated in a line of cases, of which *Mahony* v. *East Holyford Mining Co.* (1) is an instance, that a person is deemed to know of the company's articles of association. But whether Sargant L.J. has explained his reasons or not, there is no doubt about what he said, nor is there any doubt that Atkin L.J. agreed with the reasons given. In those circumstances, I am bound by the decision given by the majority of the Court in that case, and that decision precludes the plaintiffs saying: "We are deemed to know that there was a power of delegation and we are excused in those circumstances from inquiring into the company's internal management." This case having been tried as a short cause and the only evidence being upon affidavit, Mr. Pritt did not go into the question of notice, and I think Wright J. rather indicated that he could not, otherwise I should have thought that the transaction was so unusual as to put the seller and the bank upon inquiry how it came about that this odd guarantee was given in fact by a person named Clarke, who appeared to be the same person as was being guaranteed. This point was not taken, and I do not rest my judgment upon it, although if it had been taken I think that a good deal might have been said for it.

ATKIN L.J. I agree. The transaction out of which this question arises was one out of the ordinary course of business in this country. Schenkers, Ld., who are forwarding agents, and do not deal in goods except so far as they may make advances upon them, have a branch in Manchester, of which Clarke was at the material time manager. Clarke had formed a company of Clarke & Walker, Ld., for the purpose of dealing in, among other things, toys. That company, which was then recently formed, had a very small subscribed capital. Clarke went to Germany for Clarke & Walker, Ld., and bought, or agreed to buy, a large quantity of toys from one Teichmann. Teichmann, wanting to be sure about payment, consulted a man named Bauer, who was interested in the German firm of Schenkers, and he being anxious to help

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Clarke & Walker, Ld., said: "You had better get your Clarke & Walker bills indorsed by our firm of Schenkers in England, who are perfectly sound." That satisfied Teichmann. Clarke returned to England and then drew seven bills of 200*l.* each, all dated the same day and all made payable three months after date, on behalf of Schenkers, Ld., "S. Clarke, Manchester Manager," which being accepted by Clarke & Walker, Ld., were sent by Clarke to Teichmann, who took them to the plaintiff bank to be discounted. The bank, which we must assume had no notice of anything wrong with the bills, thought it necessary to make certain inquiries, and the man of whom they thought it necessary to make inquiries whether the bills were in order was the man who in fact signed them. The bank wrote to Clarke asking him whether the bills were in order and the answer received, as might be expected, was that they were. Being satisfied with that the bank discounted the bills.

The bills themselves, it is plain to my mind, were forgeries; they were false and fraudulent documents; they were concocted by Clarke for the purpose of defrauding the defendants, who had nothing to do with the bills or the consideration for them. There was no reason therefore why the defendants should pay them. But it is said that they are nevertheless liable. One reason for seeking to impose liability upon them is this; it is said: "You, the defendants, are a limited company, and as such you are in a much more awkward position than if you were a firm, because you have an article in your articles of association empowering the directors to determine who may sign bills of exchange on behalf of the company, and, therefore, any one who purports to sign a bill of exchange in the name of the company is deemed to have authority to do so." Carried to its logical conclusion, that would be a most alarming doctrine for companies, for any one who has the pen of a ready writer need only sit down and write a bill of exchange in the name of a company having an article in this form, and the company would, presumably, be bound when the bill got into the hands of a holder for value without notice, even although the bill was

an absolute forgery. The article cannot have that extended bearing, and if some limitation were not placed upon it, not merely the office boy but any one might purport to sign on behalf of the company. Such a view is not correct. Wright J. limited the application of the doctrine to such a person as falls within the category of those who under the article might properly be empowered if the appropriate steps were taken. I agree that that view is probably right. But who is the person who might properly be authorized? We are thrown back on the persons who ordinarily, apart from the articles, in view of their position in the company, would be acting within the scope of their apparent authority in signing a bill. That question must be determined apart from the actual terms of the article, which merely empowers the directors to pick out a person to whom authority may be given to sign bills. Accepting the proposition I have mentioned Wright J. was in my view wrong, in the absence of evidence, in assuming that the manager of a branch business is a person who has ostensible authority to sign bills on behalf of his company. Much depends, of course, upon the evidence as to the nature of the business and the actual position occupied by the particular person. But in the absence of evidence I am not prepared to hold that the manager of a provincial branch, even if he is in such an important position as manager of the Manchester branch of a forwarding agency, has authority to draw bills to bind his company. The actual evidence in this case was that the company never signed bills at all, and in the absence of evidence that the person has ostensible authority to draw bills I should think that he plainly has not authority to do so. Therefore, we have the ordinary case of a person having purported to exercise an authority to bind the company in fraud of the company outside the scope of his ordinary ostensible authority. If that is so, then under s. 24 of the Bills of Exchange Act, 1882, the holder is not entitled to enforce payment of these forged bills unless the principal is precluded from setting up the forgery or want of authority. To my mind, as this act was not done within the ostensible authority of the agent,

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the principal is not precluded from setting up the want of authority. That seems to me to determine this case.

The true limits of the doctrine as to the effect of an article which empowers the company or its directors to nominate a person to have authority to do a particular act on behalf of the company are, I think, made quite plain in the judgments in *Houghton & Co.* v. *Nothard, Lowe & Wills.* (1) It is therefore unnecessary to consider further the doctrine as to the knowledge of the articles of association of a company. I may say this, however, that the doctrine is as to the knowledge of the articles; that is to say, the person is to be in the same position as if he had read them, and if he had, all that he would see would be that the directors had power to nominate the particular individual who could sign bills of exchange. In such a case a person reading the articles would be in no better a position unless he went further and inquired whether or not the directors had in fact nominated that particular individual to sign the bills. There are cases where that inquiry need not be made. When, for example, you find power given to do a certain thing, and the act can be done by the company in board meeting, and there purports to be a resolution authorizing it, you are not obliged to inquire whether or not the forms of the company required by the articles as to the constitution of the board, the quorum and so forth, have been actually complied with. If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power. Those are matters of internal management which an outsider is not obliged to investigate. But we have the authority of the House of Lords in *Ruben's* case (2) for saying that the doctrine that you need not investigate whether or not the conditions regulating the internal management of the company have been strictly carried out in accordance with the articles has no application in the case of a document which is an obvious forgery. In this

(1) Ante, p. 246. (2) [1906] A. C. 439.

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case the defendants are entitled to say: "These are not our bills and we are not precluded from denying the authority of the person who purported to sign them on our behalf."

For these reasons I think that the appeal should be allowed and judgment entered for the defendants.

Appeal allowed.

Solicitors for plaintiffs: *Durrant Cooper & Hambling.*
Solicitors for defendants: *W. A. Crump & Son.*

J. S. H.

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Jan. 31;
Feb. 4.

THE KING *v.* DAILY MIRROR AND OTHERS.

Ex parte SMITH.

Contempt of Court—Newspaper—Publication of Photograph of accused Person after Arrest—Identity of accused Person in Question.

It is a contempt of court in a newspaper to publish the photograph of a person charged with a criminal offence where it is reasonably clear that the question of the identity of the accused person with the criminal has arisen or may arise, and such publication is calculated to prejudice a fair trial.

RULES NISI for attachment for contempt of court.

On January 7, 1927, an attempt was made to shoot a police officer named Dainty. On January 9 the applicant, Edgar William Smith, was arrested. On January 10 he was brought before the justices, and it was then stated that another charge might be preferred, this being reported in the press. On January 13 an identification parade was held to enable various persons to see if they could identify the person as to whom it was suggested that they could give evidence. On that morning there appeared in the Daily Mirror newspaper a photograph of Smith with the caption: "Shot P. C. charge. Edgar William Smith, of Hykeham (Lincs.), remanded at Newark on a charge of attempting to murder police constable Dainty, who, it is alleged, was shot by a motorist on a Notts country road. Bail was refused, the deputy chief

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constable stating that there might be further charges. The hearing is to be resumed to-day," and on the same morning a similar photograph appeared in the Daily Mail with the caption: "Edgar William Smith, who is on remand charged with attempting to murder police constable Dainty whom he is alleged to have shot and wounded near Newark, Nottinghamshire." None of the proposed witnesses in fact saw either of these photographs before attending the identification parade. On January 27, when Smith was committed for trial on the charge of the attempted murder of Dainty, his counsel stated that no question of identity would be raised on that charge.

The applicant obtained these rules against the editors of the Daily Mirror and Daily Mail and others, the rules being argued together.

Sir Patrick Hastings K.C. and *J. B. Melville* showed cause for the Daily Mirror. It is submitted that the publication of a photograph in these circumstances cannot constitute contempt of court. The paper has published photographs in this way since its foundation, and no complaint has ever been made to them by the Court or the police or others.

Sir John Simon K.C. and *Giveen* showed cause for the Daily Mail. In this case the question of identity did not arise on the charge of shooting, as was subsequently stated by his counsel. With regard to the other charge of a different character which it had been stated might be preferred, in which case the question of identity would be raised, there could be no contempt, because proceedings had not actually commenced, but were only contemplated.

[*Rex* v. *Parke* (1); *Rex* v. *Tibbits* (2); and Short & Mellor's Crown Office Practice, 2nd ed., p. 346, were referred to.]

A. M. Lyons in support. It has frequently been laid down that it is improper for police officers to show the photograph of an accused person to witnesses who are about to see him with a view to identification: *Rex* v. *Goss* (3);

(1) [1903] 2 K. B. 432. (2) [1902] 1 K. B. 77.
(3) (1923) 17 Cr. App. R. 196.

Rex v. *Dwyer* (1); and *Rex* v. *Haslam*. (2) If such conduct is improper in a police officer, it was equally so in the case of a newspaper. On the further charge the question of identity was always the crucial one.

[*Rex* v. *Evening Standard* (3) was also referred to.]

LORD HEWART C.J. These are rules nisi for attachment for contempt of court. The phrase "contempt of court," as has been observed more than once, is, in relation to the kind of subject-matter with which we are now concerned, a little misleading. The mischief referred to consists, not in some attitude towards the Court itself, but in conduct tending to prejudice the position of an accused person. In other words, what is really in question is nothing attacking the status of the Court as a court, but something which may profoundly affect the rights of citizens. In the present case what is complained of is that at a time when a man named Edgar William Smith had been arrested upon a charge of attempting to shoot a police officer and had been brought before the justices upon that charge, and before these proceedings had been completed, the two newspapers in question, the Daily Mirror and the Daily Mail, published on January 13 last photographs of the accused man. The Daily Mirror, indeed, employed the heading: "Shot P. C. charge. Edgar William Smith, of Hykeham (Lincs.), remanded at Newark on a charge of attempting to murder police constable Dainty, who, it is alleged, was shot by a motorist on a Notts country road. Bail was refused, the deputy chief constable stating that there might be further charges. The hearing is to be resumed to-day." In the Daily Mail the photograph appeared under somewhat different words, but it is not suggested that in the Daily Mail office there was not the same information as that which was in possession of the Daily Mirror.

Now the principles upon which this Court acts in such a matter have been clearly stated in many instances. To

(1) [1925] 2 K. B. 799. (2) (1925) 19 Cr. App. R. 59.
(3) (1924) 40 Times L. R. 833.

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refer to one case, *Reg.* v. *Payne and Cooper* (1), Lord Russell C.J. said: "the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending"; and Wright J. said (2) that "in order to justify an application to the Court the publication complained of must be calculated really to interfere with a fair trial." In the present case it is not alleged that there was on the part of any person concerned an intention to prejudice the fair trial of Smith. What is said is that the publication of these photographs at that time in this way was calculated to prejudice a fair trial. From time to time during recent years the Court of Criminal Appeal has had to consider the use of photographs by police officers in relation to criminal cases. In *Rex* v. *Goss* (3) there is this passage in the judgment: "No doubt there are circumstances in which the police of necessity make use of photographs, but to make use of photographs beforehand to see whether important witnesses can identify an accused person whom they are afterwards going to see is to pursue a course which is not a proper one." The matter was further considered by the Court of Criminal Appeal in *Rex* v. *Dwyer* (4), where this passage occurs in the judgment: "It is one thing for a police officer, who is in doubt upon the question who shall be arrested, to show a photograph to persons in order to obtain information or a clue upon that question; it is another thing for a police officer to show beforehand to persons, who are afterwards to be called as identifying witnesses, photographs of those persons whom they are about to be asked to identify. It would be most improper to inform a witness beforehand, who was to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph." And again in *Rex* v. *Haslam* (5): "Two matters emerge clearly in this appeal. First, witnesses who were called on to pick out the appellant at an identification

(1) [1896] 1 Q. B. 577, 580.
(2) Ibid. 581.
(3) 17 Cr. App. R. 196, 197.
(4) [1925] 2 K. B. 799, 802.
(5) 19 Cr. App. R. 59, 60.

parade as being the wrongdoer had previously been shown a photograph of him. It is not suggested that the photographs were shown to the witnesses that the police might obtain a clue to the direction in which enquiries might usefully be made, or to the person whom it would be proper to arrest. The appellant had already been arrested, and the effect of what was done was to give the witnesses—or certainly three of them—an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible. It cannot be right that when a witness, or a possible witness, is being called on merely to identify a person who is already arrested, that witness, before the identification, should be shown a photograph of the accused person. One can see that sometimes it will happen that when a person has been shown a photograph to assist in the arrest of a wrongdoer not yet arrested he may later give evidence of identification. That is a different thing from what happened here. In that case the person is asked to identify the accused person, notwithstanding the fact that he has previously seen a photograph. A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him."

The kind of mischief which the publication of the photograph of an accused person may bring about is indicated in these passages. Nobody would excuse a police officer in the conduct of a case if, collecting together all the various persons among whom identifying witnesses might be found, he said: " I have arrested a man, and I am going to put him up for identification by you," and then showed to those persons a photograph of the suspected person. The unfairness of that course is manifest, because the witness approaches the difficult and it may be the crucial task of identification with his mind prejudiced by the knowledge that this particular person has been arrested and is in the hands of the police. What does a newspaper do when it prints a photograph in these circumstances? It invites the whole country to scrutinize the features of the accused who has been arrested. That it does that act not in the course of preparation of the

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case for the prosecution but merely in the course of the conduct of a money-making business does not excuse in a newspaper that which would be reprehensible in a police officer. In my opinion, in the publication of a photograph no less than in narrative, it is the duty of a newspaper to take care to avoid publishing that which is calculated to prejudice a fair trial. To approach the matter in a mood of cynical indifference is obviously wrong. There is a duty to take care lest, by the publication of matter, whether in the form of a photograph or of printed words, prejudice should be caused to a person about to stand his trial. That of course does not mean, nor am I for a moment suggesting, that a newspaper is not entitled in any circumstances to publish a photograph of a person who is a party to either civil or criminal proceedings. But I am no less clear upon the point that there is a duty to refrain from the publication of the photograph of an accused person where it is apparent to a reasonable man that a question of identity may arise. If in these circumstances a newspaper prints a photograph it is taking a grave risk, which in one sense affects the accused person, and in another sense affects the newspaper.

In the present case the attempt to shoot the police officer was made on January 7, which was Friday. On Sunday, January 9, Smith was arrested. On Monday, January 10, he was brought before the justices, but it was not until Thursday, January 13, that what is called the identification parade was to take place, that is to say, Smith was to be put into the company of a number of others to be looked at by various individuals in order that it might be ascertained whether they or some of them would point him out as the guilty person. It was while that identification parade was still pending and before it had taken place that these photographs appeared. Was it at that time reasonably clear that a question of identity might arise? I think that it was clear. It certainly was not clear that a question of identity would not arise, and what these newspapers did was to take the risk. It is quite true that when the identification parade had taken place, only one person identified Smith,

and it is quite true that when, on January 27, Smith was before the justices and was committed for trial on the charge of attempted murder, it was then stated by his counsel that no question of identity would be raised. But these facts could not be foreseen by the persons responsible for the production of these two newspapers. To their minds, if they troubled to think about the matter at all, it ought to have been apparent that a question of identity might arise, and in these circumstances I think that in publishing these photographs they published matters which, although not intended, were calculated to prejudice the fair trial of the applicant.

Some matters were discussed during the argument which do not strictly arise here. We are not called upon to consider the question whether there may be contempt of court when proceedings are imminent but have not yet been launched. In the present case the question did not arise, for there was a charge and there had been an arrest, and proceedings therefore had begun. Some day that question may have to be decided, and for the moment I will only refer to a passage in the judgment of the Court, consisting of Lord Alverstone C.J., Wills and Channell JJ., delivered by Wills J. in *Rex* v. *Parke* (1): "Great stress has been laid by Mr. Danckwerts upon an expression which has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the Court. We think undue importance has been attached to it. It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased." But as I have said, that case does not arise here.

In the present case there was a duty upon the persons responsible for the production of the Daily Mirror and the Daily

(1) [1903] 2 K. B. 432, 437.

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Mail to take care with reference to the case which had arisen of an accused person then under arrest that they should refrain from publishing matter calculated to prejudice a fair trial. It happened that that duty was perhaps made even more manifest by the statement in open court, which was reported in the press, that there might be further charges against this man. In these circumstances I am satisfied that these rules ought to be made absolute. As, however, so far as the Court is aware, this is the first occasion on which the question has arisen with reference to the publication of a photograph of an accused person, we do not think it necessary to impose any penalty, but the respondents must pay the costs.

AVORY J. I agree in this judgment.

TALBOT J. I have had grave doubts whether the facts here call for the exercise of our jurisdiction. On the whole I am prepared to concur in the judgment just delivered, understanding as I do that it is dealing only with the question in relation to proceedings actually pending.

Rules absolute.

Solicitors for Daily Mirror showing cause: *Michael Abrahams, Sons & Co.*

Solicitors for Daily Mail showing cause: *Lewis & Lewis.*

Solicitors in support: *Patersons, Snow & Co., for Langley, Stevens & Phillips, Lincoln.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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Feb. 21, 23.

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Appeal—Court of Appeal—Case stated by Justices for Opinion of High Court —Leave to appeal given by Divisional Court—Competency of Appeal —Summary Jurisdiction Act, 1857 (20 & 21 *Vict. c.* 43), *s.* 6—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 31.

Clauses (*d*) and (*f*) of s. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, have to be read together, and, when so read, they allow of an appeal being brought to the Court of Appeal from the decision of the Divisional Court on a case stated by justices when leave to appeal has been given.

Justices—Appeal—Case stated—Recognizance—Appeal by Corporation—Recognizance entered into by Clerk of Corporation personally—Summary Jurisdiction Act, 1857 (20 & 21 *Vict. c.* 43), *s.* 3.

The recognizance required in the case of a corporation appealing by case stated from a decision of justices can properly be entered into by a duly authorized attorney doing so on behalf of, and binding the goods of, the corporation. A recognizance entered into by the clerk of the corporation in his own name and binding only his own goods is insufficient.

Decision of the Divisional Court, ante, p. 315, affirmed.

APPEAL from a decision of the Divisional Court reported ante, p. 315.

The facts, which are fully set out in the report in the King's Bench Division, were shortly as follows :—

The appellants took proceedings before justices under the Public Health Acts to recover from the respondent the amount of expenses incurred in connection with drainage work on his premises. The justices made an order against the respondent to pay a portion only of the sum claimed, whereupon the appellants' clerk, being dissatisfied with this determination, applied for a case to be stated for the opinion of the High Court, and he entered into a recognizance in his own name in a sum to be levied on his goods and chattels if he failed in the condition indorsed thereon, which was that he should prosecute without delay his appeal and

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submit to the judgment of the Court and pay such costs as might be awarded.

On the appeal coming on for hearing before the Divisional Court the preliminary objection was taken that the recognizance that had been entered into did not satisfy the requirements of s. 3 of the Summary Jurisdiction Act, 1857, inasmuch as it was not entered into for and on behalf of the appellant corporation and did not purport to bind their goods and chattels.

The Divisional Court upheld this objection and dismissed the appeal, but gave leave to appeal to the Court of Appeal.

Sir James O'Connor K.C. and *G. W. H. Jones* for the respondent. There is a preliminary objection to the hearing of this appeal. Before the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, such an appeal lay to the Court of Appeal if special leave was given by the Divisional Court; but the effect of that Act is to take away the right of appeal. By s. 6 of the Summary Jurisdiction Act, 1857, the decision of a superior Court on a case stated by justices is in terms made final and conclusive, a provision in effect incorporated into s. 33 of the Summary Jurisdiction Act, 1879. The position as to appeals thus created was modified by s. 45 of the Judicature Act, 1873, which provided that "the determination of such appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard." But s. 45 of that Act is repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, which further provides by s. 31, sub-s. 1, that "no appeal shall lie . . . . (*d*) from the decision of the High Court or of any judge thereof where it is provided by any Act that the decision of any Court or judge, the jurisdiction of which or of whom is now vested in the High Court, is to be final." The position therefore now is that the Summary Jurisdiction Act, 1857, which says that the decision of the

Divisional Court shall be final, continues in force, while the modification of that provision by s. 45 of the Judicature Act, 1873, enabling the Divisional Court to give leave to appeal to the Court of Appeal, has been repealed. The Act of 1925 must be construed uninfluenced by any considerations derived from the previous state of the law : per Lord Herschell in *Bank of England* v. *Vagliano*. (1)

[ATKIN L.J. In construing such an Act may we not take into account decisions on previous statutes ?]

Not where, as here, the language is clear in its prohibition of an appeal to the Court of Appeal. In *Crush* v. *Turner* (2) the Court had to consider a verbal conflict between s. 45 of the Judicature Act, 1873, and s. 20 of the Appellate Jurisdiction Act, 1876, which enacted that " where by an Act of Parliament it is provided that the decision of any Court or judge [of the High Court] is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice or of any judge thereof, to Her Majesty's Court of Appeal." It was there held that the statutory provisions in force when the Act of 1876 was passed, namely, that the decision of a Divisional Court was final unless leave to appeal was given, were unaffected by s. 20 of the Act of 1876. As Thesiger L.J. there said, a general provision could not repeal a particular section. But there, it will be observed, s. 45 of the Judicature Act, 1873, was not repealed by the Act of 1876, whereas it is repealed by the Act of 1925.

[BANKES L.J. Sect. 31, sub-s. 1 (*f*), of the Act of 1925 says that no appeal shall lie " without the leave of the Divisional Court or of the Court of Appeal, from the determination by a Divisional Court of any appeal to the High Court." Is not that in substance a reproduction of s. 45 of the Judicature Act, 1873 ?]

No, that does not apply to such an appeal as this, in view of the specific provision of s. 6 of the Summary Jurisdiction Act, 1857, and the repeal of s. 45 of the Judicature Act, 1873.

[They also referred to s. 1, sub-s. 5, of the Supreme Court of Judicature Act, 1894.]

(1) [1891] A. C. 107, 145. (2) (1878) 3 Ex. D. 303.

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Montgomery K.C. and *William Allen* for the appellants were not called on.

BANKES L.J. This preliminary point has been very clearly brought before us, but in my opinion the only construction that can be put upon s. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, is that, in substance, it reproduces the somewhat patchwork legislation in existence immediately before its enactment. The position was this: by s. 6 of the Summary Jurisdiction Act, 1857, the decision of the Court to which an appeal by case stated by justices was carried was made final and conclusive. By s. 45 of the Judicature Act, 1873, the decision of a Divisional Court in such cases was made final unless that Court gave leave to appeal. Sir James O'Connor admits that the practice which arose under those enactments enabling an appeal to be entertained by the Court of Appeal if the Divisional Court gave leave to appeal continued down to the passing of the Act of 1925, but he says that now in consequence of the last mentioned statute having repealed s. 45 of the Judicature Act, 1873, no appeal lies in such a case to the Court of Appeal. I am quite certain that the draftsman of the Act of 1925 did not intend such a result. By s. 31, sub-s. 1, cl. (*d*), of the Act of 1925 he has, in substance, reproduced the relevant provision of the Act of 1857, and then by cl. (*f*) he has, in substance, reproduced s. 1, sub-s. 5, of the Supreme Court of Judicature (Procedure) Act, 1894, which says that appeals to the High Court shall be heard and determined by a Divisional Court "and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that Court or by the Court of Appeal." It is quite true that the draftsman has not in terms repeated s. 45 of the Jurisdiction Act, 1873, but having regard to the fact that the Act of 1925 is a consolidation Act, I think that s. 31, sub-s. 1, clauses (*d*) and (*f*), must be read together and in the same sense as the corresponding provisions considered in *Crush* v. *Turner* (1) were read, that is, as enabling the Divisional Court to give leave

(1) 3 Ex. D. 303.

to appeal in such a case as this. For these reasons I think that the preliminary objection fails.

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SCRUTTON L.J. Sir James O'Connor has stated the somewhat puzzling sequence of the material statutes so clearly as to convince me that his argument is wrong. By s. 6 of the Summary Jurisdiction Act, 1857, the decision of a superior Court on a case stated by justices was made final and conclusive. By s. 45 of the Judicature Act, 1873, the determination of such an appeal by a Divisional Court was made final unless special leave to appeal was given by that Court. Sect. 6 of the Act of 1857 was not repealed. Then came s. 20 of the Appellate Jurisdiction Act, 1876, which enacted that "where by Act of Parliament it is provided that the decision of any Court or judge the jurisdiction of which Court or judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof, to Her Majesty's Court of Appeal." Shortly afterwards came the decision in *Crush* v. *Turner* (1), where the question for consideration was the effect of two verbally conflicting statutes, one saying that the decision of the Divisional Court should be final, and the other that it should be final unless leave to appeal was given. The Court of Appeal there held that the more particular statute was not abrogated by the general terms of s. 20 of the Act of 1876, so that there was still a right of appeal if special leave was given by the Divisional Court. The next in the series of enactments touching the point was the Supreme Court of Judicature (Procedure) Act, 1894, which, in substance, repeated s. 45 of the Judicature Act, 1873. Lastly, came the Act of 1925, which in s. 31 repeats s. 1, sub-s. 5, of the Act of 1894, but does not repeat s. 45 of the Act of 1873, for the reason no doubt that its subject-matter was contained in s. 1, sub-s. 5, of the Act of 1894. We therefore get the same position as that considered in *Crush* v. *Turner* (1)—a decision which has been approved by the House of Lords—which leaves as the

(1) 3 Ex. D. 303.

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governing enactment the provision which allows an appeal by leave. Any other view would require us to hold that by a mistake in a consolidation Act the existing right of appeal had been altered. I prefer to interpret the consolidation Act of 1925 as continuing, rather than as taking away, the right of appeal by leave.

ATKIN L.J. I agree.

Preliminary objection overruled.

Montgomery K.C. and *William Allen* for the appellants. The Divisional Court was wrong in holding that, in view of the form of the recognizance entered into, the appellants were not entitled to have their appeal heard. A corporation cannot enter into a recognizance : see per Dyer J. in *Anon.* (1) ; *Burghill* v. *Archbishop of York* (2) ; just as it could not do homage : see 2 Co. Litt. cap. 1, s. 90, for each of these things requires a personal act. See also Comyn's Digest, tit. Franchise, F. 14 ; and Brice on Ultra Vires, 3rd ed., p. 4. In *Cortis* v. *Kent Waterworks Co.* (3) Bayley J. said that assuming that a corporation cannot enter into a recognizance, the statutory requirement as to a recognizance is in their case wholly inapplicable ; in other words, that an appeal by them will lie although no recognizance is entered into. In the same case Littledale J. also suggested that a corporation is excused from doing that which from its nature it cannot do. It is true that Bayley J. threw out the suggestion that as a corporation may appoint an attorney for a variety of purposes, it may do so also for the purpose of entering into a recognizance, and in *Reg.* v. *Manchester Corporation* (4) Coleridge J., recognizing that a corporation cannot enter into a recognizance, referred to the evasion in practice of the difficulty by allowing one or more members of the body to enter into one for the corporation. But if a recognizance can be entered into for a corporation by an attorney, it should follow that it can be

(1) (1564) Moore, 68, pl. 182.
(2) (1696) 1 Ld. Raym. 79.
(3) (1827) 7 B. & C. 314.
(4) (1857) 7 E. & B. 453.

entered into on behalf of an individual by an attorney, but this has never been allowed.

[BANKES L.J. In *Southern Counties Deposit Bank* v. *Boaler* (1), where the contention was put forward that no recognizance is necessary in the case of an incorporated company, Wright J. said: "That depends on an antiquated notion that a corporation cannot enter into a recognizance, and that, therefore, an enactment requiring an appellant to enter into a recognizance cannot apply to a corporation."]

That case will no doubt be relied upon by the other side, but the decision there is not in harmony with the older authorities and is not binding on this Court.

[ATKIN L.J. By a recognizance the principal must be bound. The absence of this was the ground of the decision in *Boaler's* case. (1)]

It is submitted that it is sufficient if some one is bound in substitution for the principal. In that view the recognizance in fact entered into was sufficient.

Further, it is sufficient if a recognizance is verbally entered into before a justice: *Reg.* v. *St. Albans Justices* (2), and we ask leave to read an affidavit to show that this was done in the present case by the clerk on behalf of the corporation, and that a blunder was made in drawing up the record.

[ATKIN L.J. If you wanted to get rid of the record you should have taken the appropriate step to have it quashed.]

Sir James O'Connor K.C. and *G. W. H. Jones* for the respondent were not called upon.

BANKES L.J. There are no merits in this objection to the hearing of this appeal, but we must decide the question of law which has been raised.

The Leyton Urban District Council were parties to proceedings before justices, and as the justices decided against them in part they determined to appeal by way of special case. They thereupon applied to the justices to state a case, and it was then necessary that a recognizance should be entered into. The council passed a resolution giving their

(1) (1895) 59 J. P. 536. (2) (1838) 8 Ad. & E. 932.

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clerk authority to enter into a recognizance on their behalf, and thereupon he attended before a justice for that purpose. What exactly happened we do not know, because the details were not brought to the notice of the Divisional Court, and we do not think it right to allow evidence on the subject to be admitted at this late stage, one effect of which would be to attempt to contradict the written record. In fact a form of recognizance was drawn up which was manifestly insufficient, as it was entered into by the clerk on his own behalf. It recites that Mr. Atkinson, the clerk to the Leyton Urban District Council, appeared personally before a justice of the peace and "acknowledged himself to owe to our Sovereign Lord the King the sum following, namely, the sum of 100*l.* to be levied on his several goods and chattels, lands and tenements, if he, the said principal, fail in the condition" thereon indorsed. The condition indorsed recites the complaint preferred by the Leyton Urban District Council against Mr. Wilkinson, the present respondent, and the justices' determination thereon, and then it continues: "and whereas the said John Atkinson being dissatisfied with the said determination as being erroneous in point of law"—of course he was not dissatisfied; it was his council that was dissatisfied—"hath applied to the said court, pursuant to s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879, to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the King's Bench Division. . . . . If therefore the said John Atkinson after the said court of summary jurisdiction shall have stated a case setting forth the facts and the grounds thereof as aforesaid for the opinion of the said Court, shall prosecute without delay such his appeal and submit to the judgment of the said Court thereon, and pay such costs as may be awarded by the same, then the said recognizance to be void or else to stand in full force and virtue." That obviously is insufficient as a recognizance on behalf of the Leyton Urban District Council. It does not refer to their appeal and it does not purport to bind them to abide the result of the judgment of the Court

or to pay the costs. In my opinion, so far as concerns that point, the Divisional Court could not come to any other conclusion than that to which it did come. But it is said that the Leyton Urban District Council is a statutory corporation and that a corporation, whether statutory or otherwise, cannot enter an appearance in person, that a recognizance contemplates a personal appearance, and that it follows that it can be no objection that the recognizance is not in proper form, because, no matter what its form may be, it is a nullity, as the council cannot enter into any form of recognizance. That is the first step. Next it is said that the statute must be read as though it had no application to the council, because such a statutory body is free to appeal without reference to the conditions imposed by the statute. This argument depends upon the accuracy of three conditions: (1.) that a corporation cannot appear personally; (2.) that the recognizance contemplates a personal appearance, and (3.) that if those two propositions are established, the statutory requirement as to a recognizance is to be ignored. I am quite prepared to admit that by the common law a corporation could not appear personally, and I accept the proposition that by the common law a recognizance contemplated the personal appearance of the person entering into it. In view of these rules of the common law, the judges were faced with a difficulty when statutes were introduced under which corporations could become prosecutors and appellants and, if appellants, came under the obligation of entering into recognizances. We know that judges, when faced with such difficulties, extended or found a way round the common law. There were three ways in which this might be done: they might have said that a corporation cannot appeal, because it cannot enter into a recognizance. That, however, would have created great difficulties. Or they might have construed the statute as having no application to those who cannot comply with its requirements. That was the plan sometimes adopted, but it also led to endless difficulties. Or, thirdly, the judges might say that, although the common law contemplated the personal appearance of the person who enters

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into a recognizance, yet, in face of this difficulty, a corporation might appear by an attorney. There are many cases in which a corporation appears by an attorney in the same way that a corporation makes a contract. That in fact is the practice which has prevailed without question for a great number of years. It was hinted at by Bayley J. in *Cortis* v. *Kent Waterworks Co.* (1), where, referring to the argument that a corporation cannot enter into a recognizance, he said (2): "If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognizance. I am aware that there is a dictum (3) to shew that they cannot do so; but as they may appoint an attorney for a variety of purposes, I am not satisfied that they may not do so for the purpose of entering into a recognizance." In the later case of *Reg.* v. *Manchester Corporation* (4) Coleridge J., who delivered the judgment of the Court, had in mind what I have been referring to about the judges finding a way round the strictness of the old common law on this question, for he said (5): "Moreover, in the correlative case, and on the supposition that the corporate body had been the prosecutors removing the indictment, there would have been a difficulty in strictly complying with the statute, because they could not enter into a recognizance, although we are aware that in practice this is evaded by one or more members of the body entering into one for them; evaded we say, rather than overcome." Those observations were made in 1857. In 1895 in *Southern Counties Deposit Bank* v. *Boaler* (6) the respondent objected that the recognizance entered into in that case was not in order, and he succeeded, not because the corporation could not enter into a recognizance, but because the director who purported to do so was not authorized by resolution in that behalf. There Mr. Levett Q.C., who was a great lawyer, contended on behalf of the corporation, as Mr. Montgomery has contended in this case, that no recognizance at all is

(1) 7 B. & C. 314.
(2) Ibid. 331.
(3) Moore, 68.
(4) 7 E. & B. 453.
(5) Ibid. 458.
(6) 59 J. P. 536.

necessary in the case of an incorporated company, and he cited *Cortis* v. *Kent Waterworks Co.* (1) That contention provoked from Wright J. this valuable statement of his view, and he was a great authority on such points, "That depends on an antiquated notion that a corporation cannot enter into a recognizance, and that, therefore, an enactment requiring an appellant to enter into a recognizance cannot apply to a corporation." So the practice has been firmly established all over the country for recognizances, where these are required in the case of a corporation, to be accepted which have been entered into by some one on behalf of the corporation. Apparently people have not troubled to consider what is the right form to use in such a case; certainly in this case the form which was used was applicable not to a person entering into a recognizance on behalf of a corporation, but to a person entering into a recognizance on his own behalf, hence the difficulty. For the reasons I have given the appeal fails and must be dismissed.

SCRUTTON L.J. I agree. Whatever may have been the old law when there were no limited companies and not many corporations, the practice for sixty or seventy years has been to allow companies or corporations to enter into recognizances by an authorized agent. The agent must be authorized by the corporation to do this. In *Southern Counties Deposit Bank* v. *Boaler* (2) the recognizance was held bad because the person entering into it was not authorized. Further, the recognizance must be one binding the corporation. You do not get a satisfactory recognizance by A. when he, as appellant, undertakes to prosecute and make his goods liable, if you fill up a form by B. making his, B.'s, goods liable. The difficulty in this case has arisen because the entering into of a recognizance has been looked upon as an unimportant matter, and the official in this instance did not take the trouble to think what he was doing when the clerk to the council came and proposed to enter into the recognizance. By it the clerk acknowledged himself—not the corporation—to

(1) 7 B. & C. 314. (2) 59 J. P. 536.

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Scrutton L.J.

owe our sovereign lord the King the sum of 100*l.*, to be levied on his, the clerk's, goods and chattels, and then it goes on, "if he the said principal"—the clerk is not the principal—"fail in the condition hereon indorsed." The condition indorsed recites that "whereas [the clerk] being dissatisfied with the said determination"—it is not the clerk but the principal who is dissatisfied—"hath applied to the said court . . . . to state and sign a case," and he binds himself to prosecute his appeal and to submit to the judgment of the Court and to pay the costs. That is not the appeal which is desired; it is not that the clerk shall prosecute the appeal or that he shall submit to the judgment of the Court or pay the costs; it is the corporation that is to do those things. For these reasons, which are substantially those of the Divisional Court, and without going into the obsolete authorities called to our attention, I think that this appeal should be dismissed.

ATKIN L.J. There are nowadays so many proceedings that take place in courts of summary jurisdiction to which corporations are parties, and it so often happens that recognizances have to be entered into by one or other of the parties as a condition of appeal, that it is a matter of considerable embarrassment that there should be any doubt whether a corporation can or cannot enter into a recognizance. I think therefore that the time has come to declare that whatever the law may have been in the past, the law now is that a corporation can enter into a recognizance by an agent. Such a recognizance must be one entered into on behalf of the principal binding the goods of the principal and, generally, binding the principal by the conditions of the recognizance. In order properly to execute such a recognizance the agent must be duly authorized, and it is scarcely necessary to point out that there are different kinds of corporations with different ways of giving authority to their agents: sometimes it must be under seal and sometimes not. In this case it is plain that the corporation did not enter into a recognizance by a duly authorized agent. The

person who purported to be authorized to enter into the recognizance entered into one by which he bound himself to perform the conditions mentioned therein. Such a recognizance does not comply with the statutory requirements. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for John Atkinson, Leyton.*

Solicitors for respondent: *Appleton & Co.*

J. S. H.

COHEN *v.* GOLD.

1927
March 24.

Landlord and Tenant—Rent Restriction—Dwelling-house—Possession as Landlord on or after July 31, 1923*—Decontrol—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

In 1913 the plaintiff became the assignee of a lease of a house in South Hackney with twenty-six years unexpired. He went into occupation with his family and lived there until 1925, when he let three rooms on the ground floor to the defendant on a weekly tenancy, these rooms constituting a separate dwelling-house within the meaning of the Rent Restrictions Acts. He afterwards claimed to recover possession from the defendant on the ground that the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, applied so as to decontrol the premises:—

Held, that the possession by the plaintiff of the whole house at the passing of the Act of 1923 and up to the time of the letting to the defendant was not possession of the "dwelling-house" in question, nor was it possession by him in the capacity of "landlord" within s. 2, sub-s. 1, of the Act of 1923; and that therefore that section did not apply so as to decontrol the premises.

Dunbar v. *Smith* [1926] 1 K. B. 360 distinguished.

APPEAL from Shoreditch County Court.

By deed of assignment dated June 23, 1913, the plaintiff became the holder of a lease of a house in South Hackney, in the county of London, for a term of sixty-eight years commencing in 1871 and expiring in 1939. The plaintiff let the top floor in 1922, but with this exception he remained in

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possession of the whole house until 1925, when he let three rooms on the ground floor to the defendant upon a weekly tenancy at a rent of 15*s.* a week. It was admitted that these rooms constituted a separate "dwelling-house" for the purposes of the Rent Restrictions Acts. The plaintiff gave the defendant notice to quit and brought this action in the county court to recover possession. The defendant set up the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The plaintiff replied that the dwelling-house was taken out of the Rent Restrictions Acts by virtue of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1. (1) The county court judge held that the Act of 1923, s. 2, sub-s. 1, did not apply, and gave judgment for the defendant.

The plaintiff appealed.

Louis Green for the plaintiff. The plaintiff was at all material times the "landlord" of this house within s. 2, sub-s. 1, of the Act of 1923, and he had possession of the whole house in 1925 when the ground floor was let to the defendant. The dwelling-house constituted by these three rooms is therefore within s. 2, sub-s. 1, of the Act of 1923, and when the defendant became tenant in 1925 the Rent Restrictions Acts had no application to this "dwelling-house."

[ACTON J. How can you say that the plaintiff was "landlord" of this dwelling-house at the passing of the Act of 1923, when there was no tenancy existing?]

The term "landlord" is defined in s. 12 (*f*) of the Rent Restrictions Act, 1920, as "any person from time to time deriving title under the original landlord, tenant, mortgagee

(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house."

or mortgagor." The plaintiff here derives his title as assignee of the lease from the original landlord. It is also defined in s. 12 (*g*) as "any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house." It is clear from *Dunbar* v. *Smith* (1) that part of a house let as a separate dwelling is "the whole of the dwelling-house" within s. 2, sub-s. 1, of the Act of 1923, and may become decontrolled by virtue of that sub-section, even though the whole structure of the house remains under control.

[He referred also to *Catto* v. *Curry* (2) and *Finey* v. *Gougoltz.* (3)]

The defendant did not appear and was not represented.

TALBOT J. [who delivered judgment first at the request of Acton J. :] This is an action for the possession of three rooms which form the ground floor of a leasehold house at 114 King Edward Road, Hackney. The top floor of the same house was let by the plaintiff to the defendant in 1922, but the plaintiff with his family occupied and lived in the rest of the house until 1925, when he let rooms on the ground floor as a separate dwelling-house to the defendant. It has been argued that as the plaintiff, the present landlord of the three rooms, was in personal occupation of the whole house (including these three rooms) at the time of the passing of the Act, he can rely on the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1. [His lordship read this section and continued :] When the plaintiff was in actual occupation of these three rooms they did not constitute a dwelling-house but only part of one, and that not let separately, so that the relationship of landlord and tenant did not exist in respect of them. The county court judge held that s. 2, sub-s. 1, of the Act of 1923 did not apply, and that therefore the dwelling-house was not decontrolled. The onus is on the plaintiff to show that this judgment is wrong

(1) [1926] 1 K. B. 360. (2) [1926] 1 K. B. 460.
(3) [1926] 2 K. B. 322.

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in law. The real question is whether the physical occupation of the house which included these three rooms was possession of the dwelling-house constituted by these three rooms within s. 2, sub-s. 1, of the Act of 1923. I think that the county court judge was right. The Act does not apply to a case where possession by the person who is now in fact the landlord was not possession at the material time of a dwelling-house let separately, nor was possession by a landlord: and therefore there was no possession of the whole of the dwelling-house, that is at the passing of the Act of 1923. It follows that the section does not apply so as to decontrol the premises.

In *Dunbar* v. *Smith* (1) the facts of the case were different, and the point which appears in the present case did not arise. There the house in question had three floors, each of which was let separately for a period which began before the passing of the Rent Restrictions Acts. The landlord came into possession of one of these floors after the passing of the Act of 1923. The county court judge had held that it was not possession within s. 2, sub-s. 1, on the ground that although it was possession of a dwelling-house within the meaning of the Rent Restrictions Acts, it was not possession of the whole house, using the word "house" in the sense of the entire structure. The Divisional Court reversed this and held that "dwelling-house" in s. 2, sub-s. 1, had the same meaning as elsewhere in the Acts, that is to say, that rooms let as a dwelling-house, whether the whole or part of an entire structure, are a dwelling-house for the purpose of these Acts, and that the landlord having come into possession of a dwelling-house in that sense was entitled to rely on s. 2, sub-s. 1, of the Act of 1923. The distinction between that case and the present is that there the landlord after the passing of the Act of 1923 came into possession of what was already a dwelling-house within the Rent Restrictions Acts and a dwelling-house of which he was already landlord when he came into possession.

(1) [1926] 1 K. B. 360.

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In my opinion the county court judge came to a right conclusion in law and the appeal must be dismissed.

ACTON J. I agree. The Act of 1923, s. 2, sub-s. 1, relates to the exclusion of "dwelling-houses" from the application of the principal Act in certain cases. It became clear as the argument in this case proceeded that the facts of this case could not be brought within those cases of exclusion. If the words of s. 2, sub-s. 1, and the proviso are considered it is clear that the county court judge was right.

Appeal dismissed.

Solicitors for the plaintiff: *E. W. Simons & Co.*

F. P. F.

IMPORTERS COMPANY, LIMITED *v.* WESTMINSTER BANK, LIMITED.

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March 7.

[1925. I. 1970.]

Bill of Exchange—Banker—Cheque—Collecting crossed Cheque for "customer"—Bank collecting Cheque for another Bank—"Receives payment"—Cheque crossed "account payee only"—Negligence—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

Sect. 82 of the Bills of Exchange Act, 1882, gives protection to a banker who "in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself," and to which the customer has either no title or a defective title:—

Held, that the word "customer" in the section is not limited to an ordinary private customer of the bank, but applies to another bank for whom the bank, which relies on the protection of the section, collects a cheque.

Held, also, that the words "receives payment" in the section are not limited so as to apply only to a bank which receives payment as a receiving bank; they apply also to a bank which receives payment as a collecting bank.

ACTION tried before MacKinnon J.

The plaintiffs claimed to recover from the defendants 1905*l.* 15*s.* 11*d.* for moneys had and received by the defendants to the use of the plaintiffs, or, alternatively, as damages for the wrongful conversion of a number of cheques.

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The plaintiffs, who carried on business in London, purchased large quantities of paper from manufacturers in Germany. In 1924 they appointed one Schultze as their buying agent in Germany. The plaintiffs' practice was to draw cheques on their bank in London, the National Provincial Bank, Ld., made payable to the German manufacturers, the cheques being crossed and marked "account payee only." The plaintiffs then sent the cheques to Schultze in Dresden, whose duty it was to discharge the plaintiffs' debts by handing them to the German manufacturers. After a time Schultze began to commit a series of frauds. He indorsed the cheques by forging the manufacturers' names, to whom the cheques were payable, sometimes in pencil, and added his own name underneath. Schultze then paid the cheques into the Oscar Heilmann Bank, Dresden, where he had his own banking account, and was credited with the proceeds. The Oscar Heilmann Bank in due course sent the cheques to the Westminster Bank for collection, having indorsed them in German "to the order of the Westminster Bank, Ld., value in account. Oscar Heilmann." The Westminster Bank after receiving the cheques indorsed them and presented them through the clearing house to the National Provincial Bank and received the proceeds and credited the amounts in their account with the Oscar Heilmann Bank.

Schultze had become bankrupt, and the Oscar Heilmann Bank was also insolvent.

The defendants, the Westminster Bank, by their defence pleaded that the cheques were forwarded and indorsed to them for collection by their customers, the Oscar Heilmann Bank; that they had in good faith and without negligence received payment of the cheques for such customers; and they relied on s. 82 of the Bills of Exchange Act, 1882. (1)

(1) Bills of Exchange Act, 1882, s. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

They further said that the words "account payee only" did not amount to a direction to a bank collecting cheques for another bank. The cheques were all drawn payable to foreign payees, and would therefore in the ordinary course of business be presented for payment by a foreign bank through an English bank, and the words "account payee only" did not amount to a direction to the defendants as to the disposal of the proceeds of the cheques.

D. N. Pritt for the plaintiffs.

Rayner Goddard K.C. and *D. B. Somervell* for the defendants. The defendants are entitled to the protection of s. 82 of the Bills of Exchange Act, 1882, as they received payment of the cheques for a customer in good faith and without negligence. The words "account payee only" do not affect a paying banker, because a paying banker cannot see to the application of the proceeds of a cheque after it has been paid to the proper receiving banker: *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank.* (1) Those words amount to a direction to the receiving banker that the drawer desires to pay the particular cheque into the bank which keeps the account of the payee: *Bevan* v. *Capital and Counties Bank.* (2) The negotiability of a cheque is not destroyed by the words "account payee only" being written across it: *National Bank* v. *Silke.* (3) In the case of a cheque drawn on an English bank coming from abroad for payment three banks are concerned—namely, the paying bank in London, the collecting bank in London and the receiving bank abroad. The collecting bank in London is collecting for a customer—namely, the foreign bank—and cannot pay any attention to directions on the cheque as to the application of the proceeds of the cheque; his duty is to present the cheque with all promptitude to the paying bank through the clearing house, and he cannot stop in order to write to the foreign bank and inquire as to the application of the proceeds of a cheque marked "account payee only."

(1) [1904] 2 K. B. 465, 472. (2) (1906) 23 Times L. R. 65, 68.
(3) [1891] 1 Q. B. 435.

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The only duty of the collecting bank is to see that the cheque is properly indorsed to him for collection by the bank who sends the cheque forward for collection, to promptly pass the cheque through the clearing house and to pay the proceeds to the customer. A collecting bank which is not the receiving bank is not concerned with the words "account payee only" marked on a cheque any more than the paying bank is concerned with those words.

D. N. Pritt in reply. The defendants are not entitled to rely upon the protection given by s. 82 of the Bills of Exchange Act, 1882. It is admitted that the defendants acted in good faith, but they did not receive payment of the cheques without negligence, and further they did not receive payment for a customer. The defendants were negligent in the first place in disregarding the indorsements on the cheques; the form of those indorsements, the name of the German manufacturers, sometimes written in pencil, followed by the name of Schultze in a handwriting that could easily be seen to be a disguised handwriting, ought to have aroused their suspicion. The defendants were further negligent in disregarding the marking on the cheques, "account payee only." Bankers cannot by establishing for their own convenience a banking practice of ignoring an instruction given on cheques alter the law with regard to that matter. It is stated in Paget on Banking, 3rd ed., p. 295, that "it was, at one time, a common superstition among bankers that the collecting banker is not concerned with the indorsement on an order cheque. The omission, however, to see that such indorsement is in order, at least ostensibly, has been distinctly recognised as negligence on the part of the collecting banker. In *Bavins, Jun. and Sims* v. *London and South Western Bank* (1) the Court of Appeal held the collecting bank guilty of negligence in not detecting that an indorsement did not correspond with the name of the payee, though the discrepancy had apparently escaped notice even in the Court below." Bankers do not

(1) [1900] 1 Q. B. 270.

collect payment of cheques without negligence if they do not pay attention to the indorsements on the cheques. These cheques had indorsed on them special instructions that they were only to be collected for account payee. In order to obtain the protection of s. 82 the collecting bankers must see that the cheques are in order, and must also pay attention to the direction "account payee only" indorsed on the cheque. If bankers do not pay attention to that direction, because of the difficulty in which they would thereby be involved, they do so at their own risk. Bankers cannot for their own convenience ignore the positive directions of the drawer indorsed on the cheque and then say that they are entitled to the protection given by s. 82 by reason of a banking practice. Channell J. pointed out in *Bevan* v. *Capital and Counties Bank* (1) that for a banker to disregard the direction contained in the marking on a cheque "account of payees" would be negligence. The defendants' witnesses said that the defendants in receiving payment for these cheques were acting as collecting bankers only and not as receiving bankers, and that the direction "account payee only" is a direction to receiving bankers only. But s. 82 gives no protection to any one but a receiving banker, therefore the defendants are in a dilemma. Either they were not receiving payment for these cheques, in which case they are not protected by the section, or if they were receiving payment for a customer they were disregarding the instructions on the cheques and consequently were acting negligently.

The defendants were not receiving payment of the cheques for a customer but for the Oscar Heilmann Bank. That bank is not a customer of the defendant bank but only a correspondent. Sect. 82 is intended to protect a bank which receives payment of a cheque for an ordinary customer and not to protect a bank which receives payment of a cheque for another bank. Lord Halsbury L.C. said in *Great Western Ry. Co.* v. *London and County Banking Co.* (2) that s. 82 "contemplates the receipt of such a cheque

(1) 23 Times L. R. 68. (2) [1901] A. C. 414, 418.

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received in the ordinary course of business for a customer of the bank." Sect. 82 has never yet been held to apply to a case where one bank collects a cheque for another bank. In *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* (1) Bigham J. said that "money is received for a customer in those cases only where the banker acts as a mere agent to collect." The defendants have failed in this case to make out their defence.

MACKINNON J. In this case the plaintiffs bring their action against the defendants claiming the value of certain cheques as upon a claim for conversion.

The matter arises in this way. In stating the facts it will be sufficient if I refer to one cheque out of the number which are concerned. The facts are exactly the same as regards each of them. The plaintiffs, through a man named Eric Schultze, in October, 1924, had bought, or were buying, certain paper from a firm called Papierfabrik Wildenau in Germany. For the paper they so bought they appear to have owed this firm or company the sum of 91*l.* 12*s.* 6d. They drew a cheque dated October 6, 1924, for that sum of 91*l.* 12*s.* 6*d.* in this form: "Pay Messrs. Papierfabrik Wildenau or order." The cheque was drawn by the plaintiffs on their bank, the National Provincial Bank. They crossed it, and added to the crossing the words "account payee only." That cheque was sent by the plaintiffs to their agent in Dresden, Schultze, and it was his duty, under the course of business between them, to hand it over to the creditors, Papierfabrik Wildenau, and so discharge the plaintiffs' debt. Schultze unfortunately did not do what he ought to have done. He indorsed the cheque with the words "Papierfabrik Wildenau. Eric Schultze." The first two words "Papierfabrik Wildenau" were written in pencil, but nothing turns on that. It was decided as long ago as 1826 that a pencil signature on a bill of exchange is sufficient. (2) Though it is unusual, I do not think it has been disputed by Mr. Pritt that a pencil signature, if

(1) [1904] 2 K. B. 465, 470. (2) See *Geary* v. *Physic* (1826) 5 B. & C. 234.

otherwise correct and authorized, is valid. Schultze having so indorsed the cheque in blank, and of course by way of forgery, appears to have taken it to the Oscar Heilmann Bank at Dresden, where one may presume he had his own account. I suppose he paid it into his account there and was credited with the proceeds. At all events the cheque in some way came into the possession of Oscar Heilmann, and he or his servant indorsed it specially to the defendant bank, the Westminster Bank, Ld. He indorsed it in German: "Pay to the order of the Westminster Bank, Ld., value in account, Dresden, 10th October. Oscar Heilmann," and then there is an illegible signature by way of procuration. The Westminster Bank in the ordinary way received this cheque, as they constantly received other cheques, from the Oscar Heilmann Bank. The Westminster Bank put on it an indorsement so as to make it again indorsed in blank. They then, through the clearing house, presented this cheque to the National Provincial Bank, and received the proceeds. They had credited the amount of the cheque in account to Oscar Heilmann, and in due course they settled their account with him.

The plaintiffs now sue the Westminster Bank, Ld., for conversion of this cheque, inasmuch as by presenting it to the National Provincial Bank they have obtained the plaintiffs' money to the extent of 91*l.* 12*s.* 6*d.* by virtue of this cheque, the proceeds of which they had no right to receive, because their means of receiving them were derived from the first indorsement—namely, the forged indorsement of Schultze. But for a provision in the Bills of Exchange Act, 1882, the plaintiffs' claim would be a perfectly good one, because the defendants undoubtedly have obtained possession of the plaintiffs' money. But the defendants rely upon s. 82 of the Bills of Exchange Act, 1882, which provides that: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of

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having received such payment." The defendants say that they, in good faith and without negligence, received payment for their customer, Oscar Heilmann, of this cheque, and that therefore they are not liable to the plaintiffs by reason of having received that payment, although the plaintiffs undoubtedly are or were the true owners of the cheque.

Mr. Pritt says that the defendants are not entitled to rely upon the provisions of s. 82 for several reasons. He admits that the defendants acted in good faith, but he says that the section sets out three requirements which must be complied with before the section can be relied upon as a defence, and the defendants cannot say that these have been fulfilled in this case. First of all he says that the defendants cannot establish, or ought not to be held to have established, that they acted without negligence. Mr. Pritt relies, in order to show that there was negligence, upon two facts. The first is the fact that there is written across this cheque the words "account payee only." Mr. Pritt says that inasmuch as the defendants did not satisfy themselves, nor take any steps to satisfy themselves, that the proceeds of this cheque were being received by them on account of and for the ultimate benefit of the named payee, Messrs. Papierfabrik Wildenau, that was negligence. He further says that the defendants were negligent in that their suspicions were not aroused by the nature of the first indorsement itself. Those two points to some extent hang together. I think there is nothing in either of those suggestions. In the first place, though, as I have said, the fact that the first two words of the indorsement are in pencil is an unusual circumstance, there is nothing in that fact which ought in my opinion to have aroused the defendants' suspicion or put them on inquiry, more particularly as I was told by the representative of Lloyds Bank (and he rather surprised me by saying it) that they often see indorsements in pencil. It was suggested that a reasonable person would have suspected that the words "Papierfabrik Wildenau" were in the same writing

as the words "Eric Schultze." It is possible that scanning the indorsement very carefully one might draw that conclusion, but I see no reason why that fact should arouse any suspicion. The defendants could not possibly know, and cannot be supposed to have known, anything about Schultze, or the fact that he was in fact the agent of the drawers of this cheque. So far as appears from the indorsement of this cheque one would infer, if one inferred anything, that Eric Schultze was cashier, or manager, or some other officer of a German concern called Papierfabrik Wildenau. It is on the face of it a perfectly genuine and proper indorsement. There also does not seem to me anything in the other matter relied on—namely, the crossing, "account payee only"—which would suggest to an ordinary mind, or even to a suspicious mind, that the mandate contained in these words—namely, that the proceeds are only to be received on account of the named payee—was in any way being departed from. I think the obvious inference to be drawn from the form of this cheque is that Papierfabrik Wildenau was a customer of the Oscar Heilmann Bank, which the defendants knew to be a bank in Dresden; that Papierfabrik Wildenau had paid this cheque into their account at the Oscar Heilmann Bank, quite in accordance with the direction "account payee only," and that the Oscar Heilmann Bank, through its London agents, the Westminster Bank, were collecting the money which they had credited to this named payee in his own account. There does not seem, therefore, in either of these respects to be any ground on which it can be said that in presenting this cheque to the National Provincial Bank and receiving the proceeds of it the Westminster Bank, Ld., were acting negligently.

Secondly Mr. Pritt says that the defendants have not received payment for a customer within the meaning of s. 82 of the Bills of Exchange Act. His contention is that "customer" in that section cannot mean another bank for whom the bank, which is relying upon the section, collects a cheque as its collecting agent; that "customer" in that section only means what perhaps is the most ordinary and

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obvious usage of the word when one speaks of a customer of a bank—namely, a person who has an ordinary banking account with, and a passbook at, that bank. I see no reason why the word should be so limited. In fact in this case the Westminster Bank received payment from the National Provincial Bank. It is true that they received that payment on behalf of, and as collecting bank for, another bank—namely, the Oscar Heilmann Bank—but I see no reason why it should be said that the Oscar Heilmann Bank was not the Westminster Bank's customer within the meaning of the section. If any sort of limitation were to be placed upon the word "customer" so as to exclude the present case from s. 82 altogether, it would, in my opinion, be an almost impossible task to define with anything like accuracy, or in any way that would be of use as a working rule, what were the precise limits of the meaning of "customer," for which apparently Mr. Pritt contends.

Thirdly, Mr. Pritt says that the defendants did not receive payment of the cheque within the meaning of that section. I think his argument in that respect is chiefly based upon the use by a good many of the witnesses for the defendants of the terms "receiving banker" and "collecting banker," phrases which they used in quite a different sense. No doubt some of the witnesses spoke of "receiving banker" or "remitting banker" as contrasted with "collecting banker" to describe on the one hand the Oscar Heilmann Bank and on the other hand the Westminster Bank. I do not however think that the words "receives payment" in this section can be limited so as to apply only to a bank which receives payment as a remitting or receiving bank and not to apply also to a bank which receives payment as a collecting bank. It is almost impossible, in my opinion, to find more simple words than "receives payment." I think it is clear in this case that the Westminster Bank did receive payment from the National Provincial Bank of the proceeds of this cheque.

In those circumstances I think the defendants are entitled to rely upon s. 82 of the Bills of Exchange Act, 1882, as a

defence. I think, upon the undisputed facts of this case and the evidence which has been given, it being admitted that the defendants acted in good faith, that they are entitled to say that without negligence they have received payment of this cheque for a customer, and that therefore by reason of that section they are not liable to the plaintiffs as true owners of the cheque by reason of their having received that payment.

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In the result I think the plaintiffs' claim fails, and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Buckeridge & Braune.*

Solicitors for defendants: *Travers-Smith, Braithwaite & Co.*

R. F. S.

[IN THE COURT OF APPEAL.]

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March 15.

In re ROPNER SHIPPING COMPANY, LIMITED, AND CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, LIMITED.

Shipping—Charterparty—Demurrage—Shipowners bunkering Ship during Demurrage Period—Claim for Demurrage for bunkering Days.

Apart from specific provision in the charterparty, a shipowner is not entitled, while the chartered vessel is on demurrage, to use her for his own purposes and to suit his own convenience, e.g., in bunkering her, if by such use she is not available for the purposes of the charterer.

Budgett v. *Binnington* (1890) 25 Q. B. D. 320; [1891] 1 Q. B. 35 and *Cantiere Navale Triestina* v. *Handelsvertretung der Russ., etc., Naphtha Export* [1925] 2 K. B. 172 distinguished.

Decision of Roche J. affirmed.

APPEAL from a decision of Roche J. on an award stated in the form of a special case.

By a charterparty, headed "Chamber of Shipping Welsh Coal Charter, 1896," and dated October 15, 1925, made between the Ropner Shipping Company (hereinafter called

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"the owners") and the Cleeves Western Valleys Anthracite Collieries (hereinafter called "the charterers"), the steamship *Levenpool* was to proceed to Swansea and there load a cargo of coal to carry to Vancouver. The material clause of the charterparty was as follows:—

"3. The cargo to be loaded in 150 running hours (excluding bunkering time, Sundays, Custom House, colliery, and local holidays, Easter Monday and Tuesday, Whit Monday and Tuesday, and three days following Christmas Day, and from noon on Saturday or the day previous to any such holiday to 6 A.M. on Monday or the day after any such holiday unless used) commencing when written notice is given of vessel being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between the business hours of 9 A.M. and 5 P.M. or noon on Saturdays.

"If detained longer charterers shall pay demurrage" at a certain fixed rate "for every running hour."

"Any time lost through riots, strikes, lock-outs, or any dispute between masters and men occasioning a stoppage of pitmen, trimmers or other hands connected with the working or delivery of coal for which the vessel is stemmed, or by reason of accidents to mines or machinery, obstructions on the railway or in the docks; or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In case of partial holiday or partial stoppage of colliery or collieries, from any or either of the aforenamed causes, the lay hours to be extended proportionately to the diminution of output arising from such partial holiday or stoppage, but no deduction of time shall be allowed for stoppages, unless due notice be given at the time to the master or owners. . . ."

Any dispute arising under the above clause was to be referred to arbitration.

Working hours at Swansea were from 6 A.M. to 10 P.M. on week-days other than Saturdays, on which days the hours were from 6 A.M. to noon. No work was done on Sundays.

When the 150 running hours allowed by the charter for loading expired at 9 A.M. on November 18, 1925, the loading had not been completed, and demurrage began to run. At 9 P.M. on the same day, no cargo being then available for shipment, the owners shifted the vessel from the position in which she had been taking in cargo to a position where she could bunker, and at 8 P.M. on November 23, no more bunkers being then available, the vessel was shifted so that one of her cargo hatches was in a position to receive cargo, and the shipment of cargo was resumed and was completed by 8.30 P.M. on November 24. On that day also bunkering was completed. On the six days—November 18–November 24—54¾ hours were occupied in the actual operation of bunkering. The owners made no claim for demurrage in respect of those 54¾ hours or in respect of a further eight hours as to which an agreement was come to, but save to that extent they claimed that they were entitled to demurrage from the expiration of the 150 running hours allowed by the charter for loading till the completion of the loading of cargo at 8.30 P.M. on November 24, a total of 92¾ hours. The charterers admitted liability for 34¾ hours, but contested their liability for the balance.

The dispute having been referred to arbitration the following submissions in writing were made to the umpire on behalf of the owners: (*a*) demurrage or damages for detention began to accrue from 9 A.M. on November 18, and ran continuously until the steamer was completely loaded, provided that no default causing the delay was attributable to the owners, and that the charterparty did not otherwise provide; (*b*) the default referred to in (*a*) must have been a wrongful act or default which prevented the charterers loading the cargo. Bunkering under the charterparty was not a wrongful act or default; (*c*) the exceptions in the first paragraph of clause 3 of the charterparty applied only to the 150 running hours allowed for loading and did not apply to the time when the steamer was on demurrage; (*d*) that the cause of the steamer being detained from 9 A.M. on November 18 until completely loaded at 8.30 P.M. on

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November 24 was the initial failure by the charterers to load the cargo within the 150 running hours allowed by the charterparty.

On behalf of the charterers the following submissions in writing were made: (*a*) that from 9 P.M. on Wednesday, November 18, to 8 P.M. on Monday, November 23, the steamer was used solely for bunkering and the time in question was for owners' account; (*b*) that the charterers would be responsible only if they themselves detained the steamer, and that the detention for this period was by the owners for bunkering, including the non-working hours between 10 P.M. and 6 A.M. and over the week-end; and (*c*) that during the whole of the time in question the steamer was never offered back to the charterers or shifted and made available for cargo, and was not therefore at charterers' disposal.

The umpire was of opinion that demurrage was accruing during the non-working hours of the period between the expiration of the running hours and the completion of the loading; he accordingly awarded that the owners were entitled to demurrage in respect of that period, but stated his award in the form of a special case for the opinion of the Court on the question whether he was right in so holding.

Roche J., in giving judgment, said that the main contention for the owners before him was that the bunkering during demurrage time was a lawful thing for the owners to do, involving no breach of contract on their part, and, consequently, that since demurrage time was continuous after it began to run, the fact of bunkering did not break or diminish the demurrage time. In this charter there was no term allowing bunkering to be done in the demurrage period; there was no allegation in the case and no finding by the umpire that bunkering was necessary for the safety of the ship or for the prosecution of the loading; and there was nothing to show that bunkering could not have been done just as well after the loading as during its course. The case thus differed from *Houlder* v. *Weir*. (1) In his opinion,

(1) [1905] 2 K. B. 267.

unless there was something expressed in, or to be implied from, the contract, the charterers were entitled to have the whole of the demurrage time available for the purpose of loading, and the owners had no right to break into that time for the purpose of bunkering. It was said, however, for the owners that although the vessel had been shifted from the actual loading position, she could not have been loaded sooner even if she had not been shifted. That argument was founded upon the statement in the case that when the vessel was put on bunkers, "no more cargo was then available for shipment." But there was no finding that cargo was not, or could not have been, available during the five or six days spent on bunkering. The natural result of taking the ship away to bunker was that she could not load cargo, and if the owners were to succeed in their contention they would have had to allege and prove that that result did not arise in this case, and they had not done so. He therefore held that the umpire was wrong in finding that demurrage was accruing during the bunkering period.

The owners appealed.

Le Quesne K.C. and *W. L. McNair* for the owners. In this case the rule laid down in art. 129 of Scrutton on Charterparties, 12th ed., that ". . . . When the lay days have expired, demurrage, in the absence of express agreement, runs continuously during the presence in the port of the vessel either ready for or engaged in the business of loading or discharging . . . ." applies and entitles the owners to the demurrage claimed. By the charter bunkering time is excluded from the lay days, but there is no similar provision with regard to demurrage days, and we submit that for every running hour after the expiration of the lay days the charterers have to pay demurrage unless the owners have done something which amounts to a breach of the charter. Bunkering is not wrongful, and the owners have not agreed that they would not bunker during the demurrage period. It is said on the other side that the owners must keep the vessel at the disposal of the charterers. That

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proposition is much too wide. In *Houlder* v. *Weir* (1) the discharge of cargo was interrupted by reason of the ship taking in ballast, but it was held that that did not relieve the charterer from his obligation to complete the discharge within the stipulated time.

[SARGANT L.J. There the taking in of ballast was necessary for the safety of the ship and cargo remaining on board. There is no finding that in this case the taking in of bunkers was necessary for that purpose.]

The decision, however, and also that in *Cantiere Navale Triestina* v. *Handelsvertretung der Russ., etc., Naphtha Export* (2) show that the charterers' proposition in this case is much too wide. Moreover the onus is on the charterers to show that, once the vessel was on demurrage, they were prevented from loading; and if they fail to discharge that onus their obligation to pay demurrage is absolute: see *Budgett* v. *Binnington.* (3) The charterers have not shown that they were always ready and willing to load during the material period, and, in fact, it appears from the case that for some time during the bunkering period no cargo was ready for shipment.

[*Aktieselskabet Reidar* v. *Arcos* (4) was also referred to.]

Jowitt K.C. and *James Dickinson* for the charterers. Lay days and demurrage days are not in the same category, and the considerations which apply to the former do not apply to the latter. Here the charter provides that the loading must take place within a specified number of hours, and the charterers must load within that time unless they can bring themselves within the exceptions mentioned. Demurrage time is wholly different. Here the demurrage clause begins, "If detained longer," and the question therefore is, how long has the vessel been detained by the charterers? We do not question the proposition that if the charterers have no cargo ready, the owners can bunker during the demurrage period and make the charterers liable for the whole time. But that is not the position here. The vessel deliberately

(1) [1905] 2 K. B. 267.
(2) [1925] 2 K. B. 172.
(3) 25 Q. B. D. 320; [1891] 1 Q. B. 35.
(4) Ante, p. 352.

left the place where she was loading cargo and went to another place where she could only take in bunkers. How can it be said in those circumstances that she was being detained by the charterers? The owners chose to bunker during the demurrage period and now seek to make the charterers liable for that which was done solely to suit the owners' convenience.

[They were stopped.]

BANKES L.J. This is an appeal from a decision of Roche J. on a special case stated by an umpire which raises what is undoubtedly an important and an interesting question.

The owners claimed demurrage in respect of the detention of their vessel beyond her lay days. It was not in dispute that there was a breach by the charterers of the obligation to load the vessel within the 150 running hours allowed, and that the vessel had come on demurrage. The dispute arose in reference to the time occupied in bunkering the vessel during the period she was on demurrage. The owners claimed to be entitled to payment at the demurrage rate for the whole period during which the vessel was being bunkered, that is to say, not only for the working hours during which bunkering was actually proceeding but for the whole period covered by the time during which the vessel was being bunkered. On the other hand, the charterers contended that the owners were not entitled to any demurrage in respect of that particular period of time. In the arbitration the umpire set out the contentions, and those made by the owners before him are in my opinion confined to contentions of law—namely, that because the vessel had come on demurrage, and the owners being occupied merely in bunkering, demurrage was, as a matter of law, necessarily payable in respect of the whole bunkering period. The charterers' contention, on the other hand, was that they were not liable for demurrage at all while the vessel was used solely for bunkering. No question was raised before the umpire on behalf of the owners that the time occupied in bunkering was selected because no cargo was available at that time,

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that they merely occupied time which otherwise would have been wasted, and that therefore the charterers could not contend that they were relieved from their obligation to pay at the demurrage rate for the whole of that period. No such case as that was made before the umpire, and he has not dealt with the question on that footing. He has dealt with the contention of law that, no matter whether cargo was available for loading or not, the charterers were liable for the demurrage, and, on the other hand, the contention that the charterers were not liable because the vessel was used solely for bunkering. These were the rival contentions submitted to the umpire and by him to the Court, and with these Roche J. had to deal.

The charterparty provided that 150 running hours would be allowed for loading, and that if bunkering took place during those running hours the time so occupied was not to count. There was no other provision with regard to bunkering. The position therefore was this : the owners might have selected part of the 150 running hours for bunkering, and if they had done so the exceptions clause would have applied ; or they might have decided to delay bunkering until the cargo was completely loaded, in which case no question would have arisen ; or they might, as they did, decide to bunker after the 150 running hours had expired but before the cargo was completely loaded.

One must bear in mind in reference to the authorities which have been cited the facts upon which the decisions proceeded. In *Cantiere Navale Triestina* v. *Handelsvertretung der Russ., etc., Naphtha Export* (1) and *Budgett* v. *Binnington* (2) the question was whether, where there was a contract time for loading or unloading, the charterers were relieved from their obligation simply because they were not able to utilize the whole of the time in loading or unloading. It was said that the charterers, in order to excuse themselves, must show that the particular facts upon which they relied as preventing the loading or unloading were facts which came into existence because of some wrongful act on the part of

(1) [1925] 2 K. B. 172. (2) 25 Q. B. D. 320 ; [1891] 1 Q. B. 35.

the shipowners. *Houlder* v. *Weir* (1) proceeded upon the same principle, but there the facts involved an act on the part of the shipowner, not an act such as a strike, as in *Budgett* v. *Binnington* (2), or the act of a superior force, as in *Cantiere Navale Triestina* v. *Handelsvertretung der Russ., etc., Naphtha Export* (3), but an act of the owner himself, and there Channell J. decided that the act of the shipowner which prevented the charterer fulfilling his part of the contract was an act necessary to be done to secure the safety of the ship and cargo and necessary to be done at that particular time. Here I do not say what my decision would be if the case had been presented to the umpire on the footing that bunkering at the time it took place was either done then in order to trim the vessel, or for some equally good reason, or was done then because no cargo was available for loading. Nothing of that kind arises here. We have to deal with the case on the footing that the owners selected the particular time for bunkering for no reason at all except that it was the most convenient time for them. In those circumstances what is the law? In my opinion the rule laid down in art. 129 of Scrutton on Charterparties that "when the lay days have expired, demurrage, in the absence of express agreement, runs continuously during the presence in the port of the vessel either ready for or engaged in the business of loading or discharging," has no application to this case, nor have the decisions in *Cantiere Navale Triestina* v. *Handelsvertretung der Russ., etc., Naphtha Export* (3) or *Budgett* v. *Binnington* (2), because here, where it is admitted by the charterers that they were in default, the only question is whether under the contract contained in the charterparty they are under an obligation to pay demurrage in respect of the particular period selected by the owners to use the vessel entirely for their own purposes—namely, bunkering. In my opinion, this being a claim for demurrage in respect of the detention of the vessel by the charterers, it does not lie in the mouth of the owners to say that the vessel was being detained by

(1) [1905] 2 K. B. 267. (2) 25 Q. B. D. 320; [1891] 1 Q. B. 35.
(3) [1925] 2 K. B. 172.

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the charterers during the time that they, the owners, for their own convenience, were bunkering, a period which covers not merely the working hours during which bunkering actually took place but the whole time between the commencement and the completion of the bunkering. I agree in substance with Roche J. on that point, and I think his judgment was right.

A great point was made by Mr. Le Quesne as to the onus of proof, but I do not think that arises having regard to the case submitted by the umpire. I treat this case as one in which we have only to decide what is the position in law where a vessel, while on demurrage, has been used by the owners for their own purposes and for no special reason except their own convenience, and which while so used was not available for the charterers. In my opinion the appeal fails and must be dismissed.

SARGANT L.J. I am of the same opinion. The short, and the only, point decided by the umpire was this: demurrage having begun to run and while the cargo had not been completely loaded, the owners, for their own convenience, shifted the position of the vessel from the point where she was adapted to receive cargo to a point where she was adapted only to receive bunker coal, and there proceeded, during a number of days, to bunker the vessel, thus rendering it impossible during that period for the charterers to continue the loading of the cargo. The owners now claim that demurrage shall be paid by the charterers during the whole of the period the owners were so using the vessel for their own purposes, and so rendering her unavailable for the purposes of the charterers. That to my mind is an extremely bold claim to say the least of it, and I do not think it is justified. In order that demurrage may be claimed by the owners they must at least do nothing to prevent the vessel being available and at the disposal of the charterers for the purpose of completing the loading of the cargo. That to my mind disposes entirely of the case. We have had a very ingenious argument to the effect that the charterers must show not only that the

vessel was rendered unavailable for them but must also show that they had cargo ready to load upon the vessel. On that point I agree with Roche J. It seems to me that when it is shown that, by the act of the owners, the vessel has been placed in a position which renders her unavailable for the charterers' purposes in loading the cargo, it is for the owners who claim demurrage to show that the charterers had not in fact cargo available for loading during the period the vessel was used for bunkering. I do not think that was really the point before the umpire; the question raised and decided was simply the point I stated at the beginning of my judgment.

AVORY J. I agree.

Appeal dismissed.

Solicitors for owners: *Botterell & Roche.*

Solicitors for charterers: *Kinch & Richardson, for Allen Pratt & Geldard, Cardiff.*

J. S. H.

[IN THE COURT OF APPEAL.]

KOECHLIN ET CIE *v.* KESTENBAUM BROTHERS.

[1926. F. 577.]

Bill of Exchange—Foreign Bill—Indorsement—Acceptance in England—Indorsement in France by Agent of Payee in his own Name by Payee's Authority—Validity and Sufficiency of Indorsement—Liability of Acceptors—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 31, 32, 72.

A bill of exchange was drawn in France by E. V. upon the respondents in London to the order of M. V. It was sent to London, was accepted by the respondents payable at a London bank, and returned to France, where it was indorsed by E. V. in his own name, on behalf, and with the authority, of M. V., to the appellants. On presentation for payment, the respondents refused to meet it on the ground that it did not bear the indorsement of M. V., the payee, but merely the indorsement of E. V. In an action on the bill against the respondents as acceptors evidence was given that by French law an indorsement may be validly made by a duly authorized agent signing his own name:—

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Held, that the appellants as indorsees obtained a good title to the bill by virtue of s. 72 of the Bills of Exchange Act, 1882, and were entitled to recover the amount thereof from the respondents as acceptors.

Observations of Vaughan Williams L.J. in *Embiricos* v. *Anglo-Austrian Bank* [1905] 1 K. B. 677 explained.

Decision of Rowlatt J. reversed.

APPEAL from a decision of Rowlatt J., reported ante, p. 616. The facts, which are fully stated in the report below, were shortly as follows :—

The plaintiffs as indorsees of a bill of exchange for 60,000 francs, dated December 14, 1925, drawn payable to the order of M. Vigderhaus, claimed to recover 461*l.* 10*s.* thereon from the defendants as acceptors.

The bill was drawn in France by E. Vigderhaus upon the defendants in London to the order of M. Vigderhaus. It was sent to London, was accepted by the defendants payable at a London bank, returned to Paris, indorsed there by E. Vigderhaus, and discounted by the plaintiffs. On presentation for payment the defendants refused to meet it on the ground that it did not bear the indorsement of M. Vigderhaus, but merely the indorsement of E. Vigderhaus in his own name.

According to the evidence given by a French lawyer, an agent, if duly authorized, is, by French law, entitled when signing a document on behalf of his principal to sign his own name and need not add the words "per pro." There was also evidence that E. Vigderhaus was duly authorized by M. Vigderhaus to sign and indorse bills.

Rowlatt J. gave judgment for the defendants, holding (1.) that the contract of the acceptor of a bill payable to order was, by virtue of s. 31, sub-s. 3, and s. 32, sub-s. 1, of the Bills of Exchange Act, 1882, to pay a holder if the bill bore by way of indorsement the signature of the payee, and that as the bill in question did not bear that signature the defendants had not contracted to pay it; (2.) that s. 72, sub-s. 1, of the Act did not let in foreign law to dispense with the requirements of English law as to the signature of the payee on the bill itself; and (3.) that the

particular indorsement was not recognized by English law, and therefore there was no indorsement to be interpreted by foreign law within the meaning of s. 72, sub-s. 2.

The plaintiffs appealed.

du Parcq K.C. and *R. F. Levy* for the appellants. This being a foreign bill each of the successive contracts thereon is governed by the law of the place where it was made: s. 72 of the Bills of Exchange Act, 1882. In this case, therefore, the indorsement under which the plaintiffs claim is governed by French law, and as by that law an agent, if duly authorized, as was E. Vigderhaus, is entitled to sign his own name instead of that of his principal, the indorsement by him to the appellants gave them a good title to the bill. The logical inference from the authorities favours this view. The decision of the majority of the Court of Common Pleas in *Bradlaugh* v. *De Rin* (1), although reversed by the Exchequer Chamber (2) on a question of fact, is clear that an indorsement made in France must be interpreted by French law. To the same effect was the decision of the Court of Appeal in *Embiricos* v. *Anglo-Austrian Bank.* (3) In that case, where *Alcock* v. *Smith* (4) was followed, it was laid down that "the rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of bills of exchange or cheques by indorsement." No one till now has suggested, as Rowlatt J. has done, that the indorsement on a foreign bill which has been accepted in England must be valid both by the foreign law and by English law. He there founded himself upon certain observations of Vaughan Williams L.J. in *Embiricos* v. *Anglo-Austrian Bank* (3), that the contract of the acceptor is to pay on any indorsement recognized by the law of England; and Rowlatt J. held that the indorsement in this case was one which was not recognized by the law of England. But Vaughan Williams L.J., in the passage

(1) (1868) L. R. 3 C. P. 538.
(2) (1870) L. R. 5 C. P. 473.
(3) [1905] 1 K. B. 677.
(4) [1892] 1 Ch. 238.

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in question, was drawing a distinction between the local law of England and foreign law which English law may have to apply in interpreting a document. The proviso to s. 72, sub-s. 2, of the Bills of Exchange Act, 1882, which says that "where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom," is important as pointing the distinction between indorsements on inland bills and those on foreign bills: see also *Lebel* v. *Tucker*. (1)

[They also referred to *In re Marseilles Extension Railway and Land Co.* (2) and *Guatemala Republica* v. *Nunez*. (3)]

Rayner Goddard K.C. and *N. L. Macaskie* for the respondents. The decision of Rowlatt J. was right. In no case till now has it been suggested that if a bill is on the face of it irregular, in that it does not purport to bear the indorsement of the payee, an English acceptor can be called upon to pay. The person who is called upon to pay a bill is entitled to see that the payee has given his order. That is not a matter of form. There is an inconsistency on the face of this bill. The direction to the acceptors is to pay M. Vigderhaus, and there is nothing to show that he has given any direction. Such an inconsistency cannot be cured by reference to s. 72 of the Bills of Exchange Act, 1882, which deals with requisites in matters of form. Both in *Alcock* v. *Smith* (4) and *Embiricos* v. *Anglo-Austrian Bank* (5) there was an indorsement by the payee, although, it is true, that in the second case the signature was a forgery which was by Austrian law treated as ratified. The acceptor of a bill must make up his mind at once whether he will pay it or not, and if the bill when presented to him does not have upon it all the signatures which should appear, he is unable to tell whether the negotiation has been regular or not. He should not be embarrassed in this way.

[SARGANT L.J. There is less difficulty or hardship in such a case as this than in the case of a forged indorsement. In

(1) (1867) L. R. 3 Q. B. 77.
(2) (1885) 30 Ch. D. 598.
(3) Ante, p. 669.
(4) [1892] 1 Ch. 238.
(5) [1905] 1 K. B. 677.

the latter case the indorsement appears to be quite regular, whereas in a case like the present there is an apparent flaw regarding which he can make inquiry.]

Here something is imposed upon the English acceptors to which they have not contracted to submit. Their contract is to pay according to the law of their country : see *Trimbey* v. *Vignier* (1), a case as to a French promissory note, and *Lebel* v. *Tucker* (2), a case as to an English bill ; see also *Rouquette* v. *Overmann.* (3)

[BANKES L.J. Here the contract in its inception is French.]

No doubt the bill was drawn in France, but it was accepted in England and payable in England. *Bradlaugh* v. *De Rin* (4) is not a satisfactory case. The judgment of the majority in the Court of Common Pleas is a difficulty in our way, but it was wrong, and should be overruled.

[BANKES L.J. Assuming that this indorsement is governed by French law, it is good, and any further question is merely one of form.]

Secondly, foreign law is prima facie the same as English law, and the onus is on those who say it is different to establish this. Here one witness only was called to speak to French law, and his evidence was not satisfactory, as he cited no authorities. Rowlatt J. should not have acted upon that evidence, and we should have been allowed to call witnesses to show that French law is not as stated by the witness called for the appellants. In the time allowed us we were unable to get expert witnesses, and we should be allowed even now to call evidence.

Thirdly, as a bill of exchange is a contract in writing, parol evidence is not admissible to explain it. Here the bill is addressed to the acceptors, directing them to pay to M. Vigderhaus or his order. Evidence should not have been admitted to show that E. Vigderhaus was M. Vigderhaus.

No reply was called for.

(1) (1834) 1 Bing. N. C. 151.
(2) (1867) L. R. 3 Q. B. 77.
(3) (1875) L. R. 10 Q. B. 525.
(4) L. R. 3 C. P. 538.

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BANKES L.J. This case, which has been well and fully argued, raises an interesting question, but it seems to me that the point has really been settled by the Bills of Exchange Act.

The appellants, as indorsees of a foreign bill of exchange, claim payment from the respondents, the acceptors. The respondents do not deny the acceptance, but challenge the right of the indorsees to claim payment. The bill is a French bill drawn in Paris in the French language to the order of M. Vigderhaus, who has a son, E. Vigderhaus. The bill was actually drawn by the son, E. Vigderhaus, in his own name to the order of M. Vigderhaus; it was then sent to this country and was accepted by the respondents; it was then sent back to Paris, where the son, again in his own name E. Vigderhaus, indorsed it to the present appellants. The defence is that the indorsement is not in order, because the bill being drawn in favour of the father, M. Vigderhaus, should have been indorsed by him. The appellants' answer to that is that by French law if the son E. Vigderhaus was duly authorized, as he was, he was entitled to indorse the bill in his own name simpliciter, without adding the words "per pro"; and that being a French bill and the indorsement being good by French law the appellants are entitled to sue the acceptors in this country upon their contract of acceptance.

The first question is, what is the law of France applicable to this indorsement? That is a question of fact. At the trial one witness only was called on the subject, and he was called for the appellants. He said that the indorsement in question was good by French law, assuming that the son had his father's authority to indorse the bill. On cross-examination the witness admitted that although that was the law it was not universally followed; that the practice of big banks and large business houses was for an agent who indorsed a bill to indicate by the indorsement itself that he was doing so as agent for his principal, but that that was not the practice of smaller business concerns. He said, however, that it was quite sufficient in law for either a small

or a large concern to indorse a bill in the way in which the bill now in question was indorsed. One may criticize the French practice in this matter as being, according to our notions, inconvenient, but the practice does not affect the law, except that it may throw some doubt on the question what the law is. Rowlatt J. had only the one expert witness before him, and was in a position to judge of his capacity and knowledge of the law. It is quite true that the witness cited no authorities, but he spoke definitely as to the law, and there was this further fact in strong confirmation of his view that M. Vigderhaus, who was called, said that bills for millions of francs had been indorsed in this way in his business without challenge. There was some question about the respondents calling evidence as to French law, which they could not obtain at the trial, and an application was made to us to allow further evidence to be given, but in our opinion no case for acceding to this application has been made out, and the only question is whether upon the evidence given at the trial Rowlatt J. was wrong in accepting it. In my opinion the judge was justified in coming to the conclusion he did, that the witness correctly informed him as to French law. That being so we have to deal with the case on the footing that the indorsement is good according to French law.

A number of authorities have been called to our attention, but I do not want to refer to them at length, because it seems to me that the question which was raised on the authorities before the Bills of Exchange Act, 1882, must be treated as set at rest by the provisions of that statute itself, and without saying that the language used in the Act is exhaustive of every case it is sufficient to say that it covers this case. Any one interested in the subject will find a discussion as to this particular section of the Act in Dicey's Conflict of Laws, 4th ed., pp. 658 et seq. This at any rate is clear, because it was so decided by the Court of Appeal in *Embiricos* v. *Anglo-Austrian Bank* (1) long after the Bills of Exchange Act was passed, that " the rule

(1) [1905] 1 K. B. 677.

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of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of bills of exchange or cheques by indorsement." That is clear authority, if authority were required, that the ordinary rule of international law applies to this particular indorsement, and as the law applicable is French law, the appellants as indorsees have, according to French law, a perfectly good title to the bill. Why therefore should they not recover against the respondents, the acceptors? The difficulties to which the acceptor of a foreign bill may be exposed by the application of the law of the country where the various indorsements have taken place have been pointed out by Mr. Rayner Goddard, but it seems to me that that is only one of the risks which are necessarily run by a person who puts his name on a foreign bill of exchange, for he knows that the law applicable to a foreign bill may be different from that applicable to an English bill, and, even though the contract of acceptance may be governed by English law, it is subject to this, that the acceptor's obligation to pay may, and in many cases must, depend upon whether or not the person presenting the bill has, according to the law governing the contract as a whole, a title to it and a title to be paid. Sect. 72 of the Bills of Exchange Act appears to me for this purpose to be exhaustive, because it provides that "where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties and liabilities of the parties thereto"—that includes this acceptance—"are determined as follows: (1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue"—this bill is in form according to the law of France—"and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made." It is said for the respondents that, admitting that this indorsement is good by French law, something more is wrong with the bill than mere

form because, on the face of it, it is drawn in favour of M. Vigderhaus, the father, and is indorsed by E. Vigderhaus, the son. I cannot follow that argument. It seems to me that when the position is accepted that the indorsement is good by French law, and therefore good for all purposes, nothing else can be wrong with the bill except its form, and that is governed by s. 72, whether one speaks of the validity of the bill as regards requisites in form or the validity as regards requisites in form of the supervening contracts including the indorsement. Sect. 72 having been passed after the dissenting judgment in *Bradlaugh* v. *De Rin* (1) we must take it that the Legislature adopted the majority judgment in that case and incorporated it into the language of the section.

The only other observation I desire to make is with reference to the passage in the judgment of Vaughan Williams L.J. in *Embiricos* v. *Anglo-Austrian Bank* (2), upon which Rowlatt J. founded his decision. In my opinion the passage does not bear the interpretation put upon it by Rowlatt J. Vaughan Williams L.J. said this : " It has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England." He was there speaking of a forgery, which the law of England has never recognized. The Lord Justice continued : " It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract." There, as I understand him, the Lord Justice is drawing a distinction between the law of England and the law of a foreign country which the law of England will recognize, because it is the law of the foreign country applicable to the particular matter. The language used does not justify the view taken by Rowlatt J. that Vaughan Williams L.J. was there expressing

(1) L. R. 3 C. P. 538. (2) [1905] 1 K. B. 677, 684.

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himself in a sense which would justify in this case a judgment in favour of the respondents. In my opinion this appeal must be allowed.

SARGANT L.J. I am of the same opinion. As regards the first question, it seems to me that the judge had ample material upon which he was entitled to come to the conclusion that French law was as contended for by the appellants. It is quite clear, according to the evidence of the French expert, who is also a member of the English bar and who knew what he was talking about, that by French law an indorsement may be in the form employed in this case. That view is strengthened by the evidence of the constant practice of M. Vigderhaus and in similar concerns, as given by the bank manager and by M. Vigderhaus.

The second point, I think, is really concluded by the decision in *Bradlaugh* v. *De Rin* (1) adopted, as I think it is, by s. 72 of the Bills of Exchange Act, 1882. That decision, so far as the point of law is concerned, was not affected by the reversal of the decision in the Exchequer Chamber (2), where the question was entirely one of fact. The decision of the Court of Common Pleas drew a marked distinction between a foreign bill, such as was there in question, and an inland bill, such as was being dealt with in *Lebel* v. *Tucker* (3), and it seems to me that the Legislature in 1882 adopted that view, and drew the marked distinction which had been thus recognized by the Court of Common Pleas in *Bradlaugh* v. *De Rin*. (1) The result was that any one dealing with a foreign bill of exchange was in a less certain position than a person dealing with an inland bill, because in the case of an indorsement abroad on a foreign bill he might find substituted for the person to whom he was originally liable as acceptor not merely a person to whom the transfer would have been good if made in England, but a person to whom the transfer by indorsement would be good if made according to the law of the country in which it was made. That is rendered

(1) L. R. 3 C. P. 538. (2) L. R. 5 C. P. 473.
(3) L. R. 3 Q. B. 77.

perfectly clear by s. 72, sub-ss. 1 and 2, of the Act. The matter was carried probably further than was contemplated by the actual language of the sub-sections by the decision in *Embiricos* v. *Anglo-Austrian Bank.* (1) Here we have a case which does not go nearly as far as that. In my judgment the question whether this bill could properly be indorsed in the name of the payee M. Vigderhaus only or could rightly be indorsed by the son, E. Vigderhaus, in his own name if he had authority in fact to do so is purely a question of form, and is therefore covered in terms by s. 72, sub-s. 1; but if it is not covered by that sub-section it is covered by sub-s. 2, in view of the very wide effect of the decision in *Embiricos* v. *Anglo-Austrian Bank.* (1) It is said on behalf of the respondents that the contract of acceptance itself was merely to pay the original payee or some person to whom a transfer had been made by him personally. In my view that is to deal with the matter as if we were concerned with an inland bill and to neglect entirely the provisions of s. 72 with reference to foreign bills. If the indorsement in fact made is, according to the law of the place where it is made, sufficient to give a title to the indorsee, it appears to me that by the express terms of the Act the indorsee is entitled to sue. The effect is not to increase the liabilities of the acceptor, but merely to enlarge the methods by which the right to enforce those liabilities can be transferred from the person originally entitled to them to some subsequent indorsee. In conclusion I wish to say that the decision of Rowlatt J. practically amounted to this, that, in order that there may be an effectual transfer entitling the indorsee to sue, it was necessary to have an indorsement which should be good both by the law of the place where it was made and by the law of England construed in the narrow sense of the municipal law of England. In my judgment that is unsound, and would in many cases introduce insuperable difficulties. The solution is to be found in this, that it is only requisite that the transfer should be made in accordance with the total law of England, which includes not only the municipal law but the

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law of the foreign country which is by the law of England and by the very terms of s. 72 recognized as being a law which the law of England will itself recognize.

AVORY J. I entertain considerable doubt whether the French law relating to this indorsement was satisfactorily proved before the judge, who himself expressed surprise at the evidence given by the expert. I share his doubt, because it appears to me that, looked at as a whole, the evidence of the witness amounted to a proposition that the law of France regarding the indorsement of a bill of exchange was different in the case of a small business from that applicable in the case of a large business. I cannot help feeling that that cannot be the law, and I regret that the application for a longer adjournment, so that further evidence might be called, was not granted by Rowlatt J. But having accepted the evidence as he did, it appears to me that the result which has been arrived at by the other members of the Court necessarily follows in this case in view of s. 72 of the Bills of Exchange Act, 1882. I agree therefore that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Herbert Baron & Co.*
Solicitor for respondents: *Henry Snowman.*

J. S. H.

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—— *Carter* v. *Headland* [1906] A. C. 286.
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—— *Colchester* v. *Peck* [1926] 2 K. B. 366.
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—— *Dyas* v. *Stafford* (1881) 7 L. R. Ir. 590
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